

Done

THE
ONTARIO REPORTS,

VOLUME XII.

CONTAINING

REPORTS OF CASES DECIDED IN THE QUEEN'S
BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO,

WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

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BARRISTERS-AT-LAW.

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J U D G E S
OF THE
HIGH COURT OF JUSTICE

DURING THE PERIOD OF THESE REPORTS.

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ERRATA.

Page 347, catchwords : page 349, line 1, and same page line 14 from bottom, for 31-32 Vict., read 32-33 Vict.

Page 589, head-line, and last line of head-note, for sub-sec. 4 (*b*), read sec. 18, sub-sec. 4.

Page 679, line 11, for "mortgagors" read "mortgagees."

REPORTS OF CASES

DECIDED IN THE

QUEEN'S BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[CHANCERY DIVISION.]

THE BUILDING AND LOAN ASSOCIATION v. PALMER ET AL.

Setting aside alleged fraudulent conveyance of personal property—Evidence of collusion or fraud—Judgment and execution creditor—48 Vic. c. 26, ss. 2 & 3 (O.)

In an action by a creditor for an amount due on a mortgage, and to set aside a conveyance of personal property in which the Judge who tried the case found that the transaction complained of was not made with intent to defeat the claims of creditors, or to give a preference, and that no collusion or fraud was proved. It was

Held, that as none of the creditors were judgment and execution creditors, in the absence of fraud, the plaintiffs could not set aside the transaction under the statute of Elizabeth, and

That although under 48 Vic. c. 26, s. 2, (O) it might possibly be that the transaction should be held to be void as against creditors as *having the effect* of defeating, delaying, or prejudicing creditors, yet as the sale was not a sham or a colourable one, but was a real transaction and *bonâ fide*, that the plaintiffs failed on that branch of the case.

Part of the purchase money of the goods was arranged by the substitution of a note of the defendants for the notes of the defendant J. P., which had been transferred to a banker, and which note was on the subsequent sale to the defendant F. paid by him.

Held, that the transaction was a *bonâ fide* payment under 48 Vic. c. 26, s. 3, (O.)

THIS was an action brought by the Building and Loan Association against John Palmer for the amount due on a mortgage to them ; they also on behalf of themselves and

all other creditors of the said John Palmer, claimed against John Palmer, George Palmer, and Peter Ferguson, to have cancelled and set aside a sale of certain personal property made by the said John Palmer to the other defendants. George Palmer and Peter Ferguson, on the ground of collusion and fraud. It was alleged by the plaintiffs that the land mortgaged to them was an insufficient security for the amount due.

The defendants in their statements of defence denied all collusion or fraudulent intent, and set up a *bonâ fide* sale for value from John Palmer to George Palmer, and a subsequent *bonâ fide* sale for value from George Palmer to Peter Ferguson.

The action was tried and the evidence taken at the Spring Sittings held in Guelph on April 10, 1886, before Ferguson, J.

Allan Cassels appeared for the plaintiffs.

Guthrie, Q. C., for the defendants, the Palmers, and

Moss, Q. C., for the defendant Ferguson.

At the conclusion of the evidence the case was adjourned to Osgoode Hall for argument on April 12, 1886, upon which day

Allan Cassels appeared for the plaintiffs. The plaintiffs' security for the debt due being inadequate, they are entitled to proceed in this manner, and have the sale of the goods in question set aside: *Clark v. The Hamilton Provident and Loan Society*, 9 O. R. 177. The plaintiffs can avail themselves of the fact of there being no bill of sale here, as the Ontario Act of 1885, ch. 26, is virtually an insolvent act: *Snarr v. Smith*, 45 U. C. R. 156. The evidence shows that John Palmer was heavily indebted, and that there was a concurrence of intent between the defendants to defraud: *Burns v. MacKay*, 10 O. R. 167. See also *Long v. Hancock*, 12 A. R. 137, 152. *S. C.* in Supreme Court 22 C. L. J. 16. *Totten v. Douglass*, 15 Gr. 126. There was a device which cannot stand: *Powell v. Calder*, 8 O. R. 505; *Benjamin*

on Sales, 3rd ed. 457. The title never passed at all because there was fraud: *Bryan v. Child*, 5 Ex 368; *Clarke's Insolvent Acts*, 26, 27, 28; *Millar's Bills of Sale*, 124; *Kerr on Frauds*, 2nd ed., 217.

Moss, Q. C. for all the defendants. The onus of proving fraud is on the plaintiffs. The evidence shows the transaction was not colourable or a sham at all, and the plaintiffs have not proved fraud: *Nobel's Explosives Company v. Jones*, 15 Ch. D. 739. The plaintiffs suing for a judgment in this suit does not make any difference in their position as creditors who have not recovered a judgment. If there is no fraud the plaintiffs cannot invoke 48 Vic. ch. 26 (O.) The plaintiffs not being judgment creditors cannot set aside the transaction unless there is fraud. The plaintiffs have no *locus standi* unless in a case of fraud like *McDonald v. McColl*, 10 O. R. 185. The assignee has the exclusive right to sue under the Statute of Elizabeth, and under 48 Vic. ch. 26, sec. 7 (O.), and if there be no assignee there is no remedy: *Parkes v. St George*, 10 A. R. 505, 519; *Alton v. Harrison*, L. R. 4 Ch. 626; *McKenna v. Smith*, 10 Gr. 40.

Cassels, in reply. The assignee has the exclusive right to sue only when an assignee has been appointed, and in the absence of such appointment the creditors have such right. Non-production of material papers in affidavits on production is a good reason for not giving costs. All papers were not produced here.

The facts as found upon the evidence, appear in the judgment.

April 16, 1886. FERGUSON, J.—The plaintiffs being mortgagees from the defendant John Palmer, claim a judgment against him for the amount of principal money and interest unpaid upon the mortgage, which amount they say is \$4,525.00, and interest on the mortgage money from the commencement of this action. It is not denied that the plaintiffs are entitled to this relief, and there will be

judgment accordingly for the plaintiffs against the defendant John Palmer for this money ; the sum to be settled by the Registrar and inserted in the judgment as drawn up.

The plaintiffs bring the action on behalf of themselves and all other the creditors of the said John Palmer. This was originally limited to certain creditors, but by an amendment at the trial, it was made general, and the action is now as above stated on behalf of the plaintiffs and all creditors of the defendant John Palmer. The judgment above mentioned is, however, in favor of the plaintiffs, the other creditors having no interest in respect of it, one way or the other.

The other branch of the action, which is the main branch, and the one as to which has been the whole contention, (a protracted one) is to set aside a transfer of goods by the defendant John Palmer, on the ground of alleged collusion and fraud, and that the transfer was fraudulent and void as against the creditors of the defendant John Palmer, the transferor. [The learned Judge then considered the evidence as to the sales from the defendant, John Palmer, to the defendant George Palmer, and from the latter to the defendant Peter Ferguson and continued.] I find upon the evidence that the transaction or transactions complained of were not made with the intent alleged to injure and defeat the claims of the plaintiffs and the other creditors of the defendant John Palmer, or to defeat, delay, or prejudice his creditors, or to give any of them a preference over the others of them. It is clear, I think, beyond all doubt, that there was no such intent on the part of either of the defendants, George Palmer or Peter Ferguson. The existence or not of the intent on the part of the transferee of the goods would seem under the authorities to be what is important, but I am also of the opinion that it has not been shown that such was the intent of the defendant John Palmer. I think the plaintiffs have failed to prove collusion or fraud. They are not, nor are any of the creditors of the defendant John Palmer, judgment and execution creditors, and in the absence of fraud on the part

of the defendants, the authorities seem to show that the plaintiffs cannot set aside the transaction under the Statute of Elizabeth. The Act 48 Vic. ch. 26, sec. 1 (O.) repealed the second section of ch. 118 R. S. O., and the third section of the Administration of Justice Act of 1884. The second section of this Act substantially re-enacts sec. 2 of ch. 118 R. S. O., and adds or inserts the words: "Or which has such effect." These words read with the context appear to mean that a gift, assignment, or transfer * * of any goods * * by a person in insolvent circumstances, * * which has the effect of defeating, delaying, or prejudicing his creditors, * * shall as against them be void, and, it may possibly be under the provisions of this second section, the present transaction should be held to be void as against the creditors of the defendant, John Palmer, but for the provisions of the section immediately following it (the third section.) It is not necessary that I should say how this would be, for I am of opinion that the third section applies to the case; it provides, amongst other things, that "nothing in the preceding section (the second section) shall apply to any *bonâ fide* gift, conveyance, assignment, transfer, or delivery over of any goods * * which is made in consideration of any present actual *bonâ fide* payment in money, or by way of security for any present actual *bonâ fide* advance of money, or which is made in consideration of any present actual *bonâ fide* sale or delivery of goods or other property, provided that the money paid, or the goods or other property sold or delivered, bear a fair and reasonable relative value to the consideration therefor." Neither the transaction of the sale by the defendant John Palmer to the defendant George Palmer, nor that of the subsequent sale by George Palmer to the defendant Peter Ferguson, was a sham or colourable. I think they were both real transactions and *bonâ fide*. The \$1,400 was the full value of the goods in question. The \$900 was actually paid at the time in cash. The defendant John Palmer received and accepted as payment of the \$575 what was done by giving the note for it to the banker, and thus relieving him virtually in respect of this amount.

[The facts as to the payment of the \$575, as found by the learned Judge, were, that certain notes of John Palmer's for this sum were held by a banker. These were given up; and a note for the same amount, having the names of all the defendants on it was given in substitution. This last-mentioned note was subsequently paid by the defendant Ferguson.]

In *Walker v. Niles*, 18 Gr. 210, it was virtually held that the giving of a note as part of the consideration in a chattel mortgage transaction, when it was accepted in the place of money, was tantamount to advancing the money, and the same thing has, I think, been held in other cases. Here the note was given to the banker and not to the defendant John Palmer, but it appears to me to be in effect the same thing as if George Palmer had given his note, endorsed by the defendant Ferguson, to John Palmer, and he had accepted it in lieu of money, and had then handed it over to the banker, for the understanding was that George and Ferguson were to pay the note, which was drawn at 15 days. For this reason I do not think the second section of 48 Vic., chap 26 (O.), applies to the case, and I have already said that I do not think the plaintiffs can succeed under the provisions of the Statute of Elizabeth, and am of the opinion that the plaintiffs fail upon this, the important branch, of the action. Many other points were raised and discussed, but being of the opinion that I have stated, I do not think it necessary that I should decide them or any of them.

The plaintiffs will have the judgment that I have before mentioned. The other branch of the action, which is the main one, embracing all but what relates to the above mentioned judgment, will be dismissed, with costs; but the defendant, John Palmer, must submit to an adjustment of costs as between him and the plaintiffs. They are entitled as against him to the costs of recovering their judgment, and he is entitled as against them to the costs he has been put to in respect of the other branch of the action in which the plaintiffs have failed.

The defendants will have their costs of the injunction motion against the plaintiffs.

Judgment accordingly.

NOTE.—Since writing the foregoing the plaintiff's counsel has laid before me the case of *Mitchell v. Darley Main Colliery Co.* 1 Q. B. D. (*Cababe & Ellis*) 216, on the question of costs pursuant to his contention that some papers were produced and put in evidence by the defence that were not produced with or mentioned in the affidavit on production. I do not see, however, that in this respect the present case is the same as that case. In that case it seems plain that the production of the document or book, virtually put an end to the contention, because it had to be admitted that the effect of it was, under the circumstances, to prove the plea of the Statute of Limitations. On its production the case was postponed to give counsel an opportunity to consider if he could then go on with the case with any hope of success in the face of a case that had been decided on the subject. And when the case was again called, counsel had concluded that he could not get on in the face of the evidence.

I cannot consider this case at all like that one, and I do not make any direction as to costs other than that above made.

G. A. B

[COMMON PLEAS DIVISION.]

CRAWFORD V. BUGG.

Landlord and tenant—Covenants not to assign or sub-let, and for quiet enjoyment, and to repair according to notice—Assigns named—Reasonable wear and tear, &c.—Implied covenant to use premises in tenant-like manner—Action of waste—R. S. O. ch. 107, sec. 9.

On May 19th, 1870, E. made a lease of certain household premises to P. for twenty-one years. On 30th June, 1871, P., with E.'s assent, assigned to J. B. On 10th April, 1877, E., who was merely a bare trustee for plaintiff, assigned the reversion to her. On 29th December, 1882, J. B., without plaintiff's knowledge or assent, assigned to C. B., who thereafter was in possession of the property, receiving the rents from sub-tenants and paying the rents under the principal lease to the plaintiff. The plaintiff had also received the rents prior to E.'s assignment to her. The lease was under seal, and was in the ordinary printed form, and purported to be under the Short Form Act. The statutory covenants were prefaced by the words: "And the said lessee for himself, his heirs and executors, administrators and assigns hereby covenants with the said lessor, his heirs and executors, administrators and assigns in manner and form following, that is to say." Then followed the ordinary statutory covenants, except after the covenant "to repair" were the words "reasonable wear and tear and accidents by fire and tempest excepted," and after the covenant, "not to assign or sublet without leave," the additional covenant "and not to carry on any business that shall be deemed a nuisance." The covenant not to assign was (except as to the additional words) in the language used in covenant 7, column 2 of the Short Form of Leases Act.

Held, that the covenant not to assign or sub-let, &c., did not include assignees, as they could not be held to be named; and the prefatory words to the covenant would have no contrary effect; and therefore J. B.'s assignment to C. B. was no breach thereof: and this was equally so as to sub-letting by using the premises as a tenement house; and also from the fact of the user having been open and notorious both by P. and J. B. for some thirteen years a license to do so must be presumed.

Quære, whether such covenant ran with the land, the authorities on the point being conflicting; but the County Judge, to whom the case had been referred, having found that it did so run, a Judge sitting in single Court refused to interfere.

Held, that the covenant to repair ran with the land; that J. B.'s liability as assignee of the term ceased on his assignment to C. B.; and he would only be liable for the breaches, if any, which occurred prior thereto; and the covenant must be read as subject to the words, "reasonable wear and tear," &c.

Held, also, that there could be no liability on defendants as executors of J. B. for breach of implied covenant by themselves and J. B. to use the premises in a tenant-like manner, for there being a lease under seal with express covenants, no such implied covenant would arise.

Held, also that an action of waste would lie notwithstanding the express covenant to repair; but there must be what would constitute waste. A mere breach of covenant, not amounting to waste, not being sufficient; but to maintain such action the plaintiff must have a vested interest in the reversion, at the time waste committed, so that her claim, if any, must be for waste committed after she acquired the reversion and up to J. B.'s assignment; but there could be no

liability here, for as to J. B. it appeared his assignment was made more than a year prior to his decease; and the R. S. O. ch. 107, sec. 9, only applied to breaches committed by testator within six months prior to his decease; and that it was not necessary for the defendant to set this up as a defence, the onus being on plaintiff to shew she came within the statute; and as to the executors it appeared they had no interest in the term and had never intermeddled with the property.

Held, also, that there was no breach of the covenant by defendant to repair according to notice because the notice was given to J. B. after he had parted with his interest in the term.

Held, also that as to many of the alleged breaches they were such as came within the terms "reasonable wear and tear;" while to others the evidence failed to disclose the date when they occurred and therefore whether prior to the assignment to J. B.

ACTION for breach of covenants in a lease. The cause came on for trial before Hagarty, C. J., and a jury, when the case was referred by consent to Macdougall, Co. J.

The reference subsequently came on before Macdougall, Co. J., when, after hearing the evidence, he gave the following judgment:

MACDOUGALL, Co. J.—This is an action brought by the plaintiff, Mary Helen Crawford, against the executors of the late John Bugg to recover damages for various alleged breaches of covenants in the lease.

The history of the present relative position of the parties to this action is as follows:—By a lease, bearing date May 19, 1870, one Remigius Elmsley demised to one John S. Powell for a term of twenty-one years, to be computed from the first of August, 1870, certain premises situated on Dorset street, in the city of Toronto, known throughout the evidence as the London House.

By an assignment, which, for the purposes of this suit, it is admitted was executed with the assent of the lessor R. Elmsley, John S. Powell, assigned the term created by the said above-recited lease to the late John Bugg, which assignment was dated 30th June, 1871.

By deed, dated 10th April, 1877, Remigius Elmsley assigned the reversion in fee in the demised premises to the plaintiff Helen Mary Crawford. This deed recites that Mr. Elmsley had received originally the conveyance of the demised premises in trust for the plaintiff in this action; and to evidence this that he had executed a declaration of trust in January, 1867, which trust was to hold the lands therein described subject to the will and direction of the plaintiff; and that she had requested him to convey to her the premises described in the declaration of trust; and the conveyance of the 10th April, 1877, purports to be executed in pursuance of this request.

It also appears that the rent of the premises in question had always been paid directly to the plaintiff, or her husband in his lifetime for her, by Powell and John Bugg, both before and after the date of the conveyance by Elmsley to her in 1877.

On the 29th December, 1882, John Bugg assigned the lease in question, without the knowledge or assent, it is alleged, of the plaintiff, to his son, Charles Bugg, who since that date has been in possession of the property and receiving the rents from the sub-tenants, and paying rent under the principal lease to the plaintiff, who has received the same, but without being aware, it is said, of Charles Bugg having become the assignee of the term.

The original lease is upon the ordinary printed form, and purports to be drawn in pursuance of the Act respecting Short Forms of Leases; but the portion containing the statutory covenants is prefaced by the following words, instead of those used in the statute:—"And the said lessee, for himself, his heirs, executors, administrators and assigns, hereby covenants with the said lessor, his heirs, executors, administrators, and assigns in form and manner following, that is to say: To pay rent," &c. And then follow the ordinary statutory covenants in the language used in the statute, with, however, the following words added after the statutory words: "and to repair," "reasonable wear and tear and accidents by fire and tempest excepted;" and after the statutory covenant of not assigning or sub-letting without leave, the additional covenant is inserted: "not to carry on any business that shall be deemed a nuisance on said premises."

It appears from the evidence given that Powell, after he took his lease, sub-let the premises in question to a number of tenants who occupied various rooms in the house as separate holdings. This was the use to which the building was put when it came into John Bugg's hands; and he, during the time he was assignee, employed the premises in the same way, letting it out in a number of small monthly holdings to a number of sub-tenants; and such, also, has been the character of the user since Charles Bugg has been assignee.

John Bugg died on the 1st January, 1884.

About the middle of September, 1883, a notice to repair the demised premises was served upon John Bugg (Exhibit "G"); and a number of details of the alleged repairs required to be done are set out in this notice. No attention, it is said, was paid to the notice; and, on the 13th February, 1884, a writ was issued in this cause against Charles Bugg, Emma Bugg, Robert Jaffray, and John Kent, the executors under the last will and testament of John Bugg.

The plaintiff's statement of claim sets out the lease and its terms; the covenant to repair; to repair according to notice by Powell; the assignment of the reversion to the plaintiff; the assignment of the term by Powell to John Bugg; the death of John Bugg; the appointment by his will of the defendants as his executors, and the payment of rent by the executors since John Bugg's death to the plaintiff in respect of the demised premises. The breaches are then alleged. 1. Breach of covenant to repair in John Bugg's life-time. 2. Breach by defendants of covenants to repair after John Bugg's death. 3. Breach of covenant to repair according to notice in John Bugg's lifetime, alleging the giving of the notice on the 17th September, 1883, and failure to comply with its requirements.

4. Breach by the defendants since John Bugg's death to comply with the terms of said notice of September. 5. Allegation of implied covenant on the part of John Bugg to use the premises in a tenant-like and proper manner; and alleging as a breach the sub-letting of the same to divers persons from time to time of ill-fame, loose character, and drinking habits, who used said premises in such manner that the same became a public and private nuisance, and through such occupation and lack of proper repairs, drainage, ventilation, &c., the premises became productive of foul and infectious diseases, &c. 6. That the defendants as executors of the late John Bugg, took subject to the like implied covenant and similar allegations of breach in every respect by them. 7. An allegation of permissive waste by John Bugg, by suffering the premises to become ruinous in decay, &c., through doors, door-ways, floors, stair-ways, &c., not being repaired, fences torn down and removed, &c.; and alleging as damage injury to the plaintiff's reversion. 8. Like allegations and the like breach by the defendants since John Bugg's death. The statement of claim concluded with the averment of damage by reason of the foregoing breaches to the extent of \$2,000.

The defendants set up as a defence: The assignment by John Bugg in his lifetime of the term in the demised premises to Charles Bugg, who, it is alleged, entered into possession and receipt of the rents and profits; and denied that the defendants as executors were either in possession or entitled to any estate or interest therein.

2. That the defendants have never paid rent in respect of the premises, or dealt in any manner with the property since John Bugg's death.

3. Denying liability under Powell's covenant to repair in the original lease, in respect of themselves or their testator's estate; and claiming the benefit of this defence as if they had demurred thereto.

4. Allegation that at the date of assignment to John Bugg, the demised premises, from age, and by the operation of nature and the elements, were in a poor state of repair; and that, having regard to this, that John Bugg and the defendants have kept the same well and sufficiently repaired within the meaning of the covenant to repair.

5. Allegation, that the premises, in the lifetime of John Bugg, and now are, in the same state of good and sufficient repair as they were in on and before the date of assignment to John Bugg in 1871, wear and tear, and damage by fire and tempest excepted.

6. Denial of any covenant by John Bugg to use the premises in a tenant-like and proper manner.

7. Denial of the premises being used in an untenant-like and improper manner by either John Bugg or themselves.

8. Allegation that the plaintiff herself and Powell had each of them used the demised premises as a tenement house; and had sub-let the same to a similar class of tenants as those complained of; and that John Bugg only continued to use it for the same purposes; and that the plaintiff, with full knowledge of its being intended that it should be so used by John Bugg, consented to the assignment of the term to him, and consented to Bugg so sub-letting.

9. Similar allegations as the last ; and that the premises are unfit to be used for any other purposes.

10. Denial of any waste ; or, if any waste allowed, denial of liability therefor, and claiming the same benefit as to this defence as if demurred to.

11. Allegation that the present condition of the demised premises is the result of age and natural decay, and is not the result of any omission of duty on the part of John Bugg or the defendants.

12. Denial of any damage in consequence of the alleged breaches ; but on the contrary that the reversion has been improved in value.

13. Denial of the plaintiff's right to enter the premises under the covenant to repair according to notice, and to give any such notice.

The plaintiff takes issue upon all these defences.

At the hearing before me, I allowed the plaintiff to amend her statement of claim by alleging breaches of the covenant to sub-let and assign without leave, in sub-letting to a variety of tenants, and by assigning to Charles Bugg.

To this amended statement of claim the defendants have replied, denying any such covenant ; and setting up again substantially their eighth defence as herein noted by me, except that they further allege that the plaintiff is estopped from raising the question of sub-letting by her own conduct in allowing John Bugg to take the assignment from John Powell, who had employed the premises during his term by sub-letting ; and that the plaintiff, or her predecessors in title, before leasing to Powell, used them in the same manner ; and the further reply of waiver by conduct of the alleged breach of sub-letting ; and they add a further reply of an express waiver of the alleged breach of the covenant not to assign or sub-let alleged to have been committed by John Bugg's assigning to Charles Bugg in December, 1882.

It will be seen from the foregoing summary of the principal facts and of the pleadings, that nearly every possible issue of fact and law has been raised ; and when I add that the evidence comprises nearly a thousand folios, it will also be plain that the litigants have made a determined effort to support their various contentions.

Before entering upon a consideration of the effect of the evidence as establishing non-repair, I propose to first consider the legal aspects of the case, and to endeavour to point out what I consider to be the liability of the various parties or their representatives in respect to the lease and its covenants, and under the various assignments proved.

First, as to the lease itself. According to the best authority some of the express covenants in a lease, which run with the land, and which bind the assignee of the lessee of demised premises, though not named, are the following : 1. To pay the rent : *Spencer's Case*, 5 Rep. 16 ; 3 Co. R. 29. 2. To repair or leave in a state of repair : *Dean and Chapter of Windsor's Case*, 5 Rep. 24, 3 Co. R. 47, Cro. Eliz. 552 ; *Blake's Case*, 6 Rep. 43, 3 Co. R. 342 ; *Keeling v. Morrice*, 12 Mod. 371 ; *Matures v. Westwood*, Cro. Eliz. 599, 617. But it is doubtful if a covenant not to assign or sub-let without leave is a covenant which runs with the land

unless the assignee is named. Now in the lease in question we must consider whether the assignee is named. The language employed in this lease is exactly the language used in a lease under consideration in the case of *Lee v. Lorsch*, 37 U. C. R. 262; and in that case it was decided—though with an expression on the part of the learned Chief Justice Richards, that had the Court been sitting as a Court of Appeal, a different conclusion might have been arrived at—that where the lessor has not chosen to use the words in column one of our statute to indicate the covenant which is to be entered into by the lessee, but chooses to insert the covenant in extenso, as in the lease in this case, that these words must be interpreted by their own meaning, without any aid from the statute. He held, under precisely the same wording as here, that the effect of the language was to constitute only a personal covenant on the part of the lessee, and not to be binding on his executors, administrators and assigns, as they were not named. It was further held the assignee not being named, that the covenant not to assign without leave did not run with the land; and therefore, an assignment without leave by an assignee was no breach of a covenant which was only personal to the lessee.

In *Williams v. Earle*, L. R. 3 Q. B. 739, Blackburn, J., held that the covenant not to assign without leave ran with the land; and the assignee was bound in that case for a similar alleged breach of covenant, because he was expressly named.

It has been urged before me that this decision would bear a broader construction and be authority for establishing the liability of the assignee, though not named; but in the case of *West v. Dobb*, L. R. 4 Q. B. 634, 637, the reporter notes, that Lord Blackburn protested against his judgment in *Williams v. Earle*, being considered as an authority for holding that the covenant not to assign should be considered to run with the land in any case *except where the assigns were expressly named*.

I have not been able to find the authority of *Lee v. Lorsch* questioned by any later authority in our own Courts upon this particular point, though the effect of the other covenants, and other variations from the statutory language in the Act respecting Short Forms of Leases, are dealt with upon some points in the case of *Emmett v. Quinn*, 7 A. R. 306.

I must therefore hold that the covenant not to assign without leave was not binding upon John Bugg as assignee of the original lessee John S. Powell; and that as a consequence of this view, that his assignment in December, 1882, to his son Charles Bugg, was no breach of covenant for which the plaintiff can sue.

Now it has been expressly held that an action of covenant will not lie against an assignee of a lessee for breaches of covenant happening after he has ceased to be such assignee; and that with the object of escaping future liability he may even assign to a mere pauper: *Taylor v. Shum*, 1 B. & P. 21; *Odell v. Wake*, 3 Camp. 394; *Onslow v. Corrie*, 2 Madd. 330; *Paul v. Nurse*, 2 M. & R. 525. But he continues liable for breaches of covenant committed while he was such assignee: *Harley v. King*, 2 C. M. & R. 18.

In the same way the assignee of the reversion can only maintain an action for breaches of covenant committed during his ownership; and, if the covenant be merely to perform a single act, which not being done is broken once for all before assignment made, an action will not lie at the suit of the assignee for such breach; but if the covenant be broken before the assignment, and there is a continuing breach after assignment, the assignee of the reversion is entitled to recover damages: *Johnson v. Churchwardens of St. Peter Hereford*, 4 A. & E. 520; *Doe d. Ambler v. Woodbridge*, 9 B. & C. 376; 32 Hen. VIII. ch. 34.

This being the law deduced from the cases, I think that the defendants are liable for any breaches of the covenant to repair committed by their testator, John Bugg, while he was assignee of the term, should the evidence establish the fact that John Bugg had been guilty of any such breaches.

I am of opinion also that the plaintiff has no cause of action upon the issue charging the defendants as executors as liable for breach of an implied covenant by themselves and by John Bugg, to use the demised premises in a tenant-like manner. I think there is no such implied covenant in a case where there is a lease under seal containing an express covenant to repair: *Standen v. Chrismas*, 10 Q. B. 135.

The remarks I have heretofore made upon the alleged breach of the covenant not to assign without leave, apply to the alleged further breach by sub-letting to a number of tenants. The covenant not to assign or sub-let without leave is one covenant; and, in my view, is binding only on assignees that are named. And again, apart from this, I am inclined to think that the open and notorious use made by Powell from the date of his lease, and by John Bugg while he was assignee of the demised premises, as a tenement house, the plaintiff receiving rent regularly, with a full knowledge of this fact, would warrant me, after thirteen years user in this manner, and under such circumstances, in presuming that a license to use the premises in this manner had been granted by the plaintiff and her predecessor in title: *Gibson v. Doeg*, 2 H. & N. 615.

The particular breaches for which the defendants, as representing John Bugg, would be liable, occurred fifteen months before action, he having assigned the term in December, 1882, and the plaintiff duly received each quarter's rent up to John Bugg's death. This is entirely apart from the assignment of the term to Charles Bugg; for if it be true that the plaintiff was unaware of that assignment, she would receive the rent as being paid by John Bugg, the person alleged to have committed this breach of covenant.

Paragraph 17, of the statement of claim, claims damages for alleged permissive waste allowed by John Bugg in his lifetime by suffering the premises "to become and be ruinous and in decay in the doors, doorways, floors, stairways, steps, shutters, hearths, fire-places, portico, basement, windows, roof, out-house, and walls of the said houses. for want of needful and necessary repairing thereof, and by permitting the fences to be torn down and taken away."

An action on the case for waste, it appears, will lie, notwithstanding au

express covenant to repair : *Kinlyside v. Thornton*, 2 Wm. Bl. 1111 ; *Marker v. Kenrick*, 13 C. B. 188, 198. But it is said that an action for waste can lie only for that which would be waste if there was no covenant ; and that, therefore, proof of a mere breach of covenant, not amounting to waste, will not support the action : *Jones v. Hill*, 7 Taunt. 392 ; *Bullen & Leake's Prec.*, 3rd ed., 423.

To maintain an action, the plaintiff must have a vested interest in the reversion at the time the waste was committed : *Bacon v. Smith*, 1 Q. B. 345. In this case the plaintiff became assignee of the reversion in April, 1877 ; and consequently her right of action would be only for waste committed or permitted by John Bugg between that period and the date of his assignment to Charles Bugg in 1882. John Bugg transferred his interest in the term in question more than a year before his death ; and it is his executors who are being proceeded against for this alleged wrong.

Under our statute executors are not liable as such, unless for a tort committed by their testator within six months prior to his decease, and the action brought within the six months thereafter. Here the action is brought within six months after John Bugg's death, but for an act which, so far as John Bugg is concerned, if committed at all, occurred more than a year before his death. This, then, will be a complete answer to the plaintiff's claim to recover for waste, if the general denial of liability by defendants in the eleventh paragraph of their statement of defence enables me to look at and apply section 9 of the Trustee and Executors Act, R. S. O. ch. 107.

At common law there would be no action against a man's executors for a wrong committed by their testator to the realty of another in his lifetime. The statute has altered the common law by preserving the right of action for a limited period against a man's representatives, if the wrong complained of was committed within six months before the wrong-doer's death ; but it is for the plaintiff to shew, as part of her case, that she is within the statute, and where the proceeding, as here, is against executors, to make the necessary averment which upon proof would entitle her to succeed.

It is unlike a statute of limitations, which bars the action, and the defence of which must be pleaded specially. The statute creates the liability by suspending the destruction of the cause of action for six months, and for antecedent wrongs committed within the prescribed period. To succeed against executors the plaintiff must prove herself within the privileges of the statute. This, in the present case, has not been done. The plaintiff will therefore fail upon this issue.

As to the waste alleged to have been committed by the defendants themselves since John Bugg's death, the evidence shews that no estate or interest in the term ever vested in them, and that they never intermeddled with the property in question in any manner whatever.

I will next consider the question of repairing according to notice. Here the notice was served upon John Bugg in his life time, but after he had parted with his interest in the term. I do not think, in view of this,

that the plaintiff can succeed. There never was any privity of contract between John Bugg and the plaintiff, and all privity of estate had ceased nine months before the service of the notice in question. It is true that it is alleged that the plaintiff knew nothing of the assignment to Charles Bugg, but lack of this knowledge could not I fear assist her. The covenant to repair according to notice had ceased, in my opinion, to be operative, so far as John Bugg was concerned, by the termination of his privity of estate with the plaintiff.

The result, then, of my conclusions of law upon the foregoing facts and issues raised by the pleadings herein, leaves but one issue open upon which I think the plaintiff could secure a verdict against the defendants in this action. That is the issue raised by the allegation of a breach of covenant to repair by John Bugg during the time that he was assignee of the term. This conclusion will also absolve me from the necessity of enquiring into any further or other defences raised by the pleadings than those pleaded to that part of the plaintiff's statement of claim. The defences pleaded are : First, denial of liability under the covenant to repair in original lease, as a matter of law : Second, that at the date of the assignment of the term to John Bugg the demised premises, through age and operation of nature and the elements, were in a poor state of repair, and that having regard to this, John Bugg kept the same well and sufficiently repaired within the meaning of the covenant to repair : Third, allegation that the premises in the lifetime of John Bugg, and now are, in the same state of good and sufficient repair, as they were at the date of the assignment to him in 1871, wear and tear and damage by fire excepted : Fourth, denial of any damage by reason of alleged breaches ; but on the contrary that the reversion is increased in value.

The statutory covenant in this case to repair must be read as containing the words (reasonable wear and tear, and accidents by fire and tempest excepted), which are not included in the extended form, column two of the statute ; but which words are expressly added after the words (to repair) in the lease under consideration.

As to the meaning of "to repair," Erle, J., in *Martyn v. Clue*, 18 Q. B. 661, says, at p. 674 : "To repair is not the same as to put in repair, which may require the building of something new. The ordinary repairing covenant is merely to maintain things *in esse in the state they were in when the premises were demised.*"

In *Woodfall*, on L. & T., 12th ed., p. 562, it is said : "Where a lessee covenants to keep *old* premises in repair, he is not liable for such dilapidations as result from the natural operation of time and the elements ; and with a view to determine the relative sufficiency of repair, the jury may consider whether the house was new or old at the time of the demise ; and what was its *then* state of repair and condition *generally* not in detail."

Tenantable repairs of buildings in a general covenant for that purpose are intermediate between substantial repairs, which consist of bricklayers, and carpenters' work, and ornamental repairs, which consist of papering, painting, and white-washing : *Wood on Dilapidations*, p. 8. The tenant is

bound to preserve the fabric of the buildings from permanent decay, and for that purpose is obliged to repair the external covering of the house, whether slated, tiled, or thatched, and he must repair the place and restore broken windows, and mend chimneys when injured. So any damage done to the woodwork of the building through want of ordinary care, and not caused merely by time and use, must be restored. Such as permitting the racks of a stable to become decayed: *Anon*, 2 Ventr. 214. The tenant is only bound to maintain an old building in suitable repair. It is not meant that an old building is to be restored in a new form at the end of the term or of greater value than at the commencement; but the tenant is to take care that the premises do not suffer more than the operation of time and nature would affect. He is bound, I take it, by reasonable application and labour, to keep the premises as nearly as possible in the same condition as when they were demised: *Gutteridge v. Munyard*, 1 Moo. & R. 334; *Belcher v. McIntosh*, 8 C. P. 720.

By examining the notice to repair served we will ascertain what repairs it is claimed by plaintiff were required to be made, and for the non-performance of which it is alleged this action lies.

[The learned Judge then went very fully into the evidence as to the repairs, but was unable to say on the evidence when the alleged breaches arose. He held, however, that as to many of them, the alleged breaches were such as would come within the exception "reasonable wear and tear," while as to other items of non-repair, which on a strict view of the covenant might be construed as amounting to breaches of the covenant, the evidence failed to disclose that these conditions of non-repair existed prior to John Bugg's assignment to Charles Bugg, of the term: that the defendants as executors would only be liable for the breaches of the covenant committed by their testator John Bugg in his lifetime, and within six months of his decease, and the assignment to Charles Bugg took place more than a year prior to John Bugg's decease. He therefore found in favour of the defendants.]

Now, though this is my decision, yet I think a different result would have followed had plaintiff been aware of the assignment to Charles Bugg, and brought her action against him. I think then that she might properly have been entitled to recover some damages against him for a breach of the Covenant to repair. It is true he is a defendant in this suit, but it is only in his capacity as executor and as representing the estate of John Bugg. I find as a fact that he never communicated to the plaintiff or her solicitors the particulars of his father's assignment to him. I think the defendants should have made this communication. Then again, the notice to repair was served upon John Bugg in his lifetime, and after the assignment to his son, Charles; but John Bugg says nothing to the plaintiff about an assignment, nor do the defendants after his death communicate the fact until this action is brought.

In view of these facts, and upon consideration of the whole case, I must refuse the defendants any costs of the cause or reference; and direct them to pay one-half the costs of my award, and one-half of the shorthand reporter's charges.

From this judgment the plaintiff appealed.

January 20, 1886, *Richards*, Q.C., and *Nelson*, for the plaintiff.

W. Macdonald, for the defendants.

March 16, 1886. ROSE, J.—Mr. Richards submitted that the learned county judge was in error in finding as a matter of law, that the covenant not to assign or sublet without leave, did not run with the land; and that as the assigns were not named in the covenant John Bugg was not bound by the covenant; and hence that the assignment to his son Charles was not a breach.

2. That the learned judge should not have found as a matter of law, that the plaintiff was confined, in an action against the executors for waste, to recovering damages suffered only during the six months preceding the death of John Bugg, as the defendant had not pleaded the limitation.

3. That the learned Judge was in error in his construction of the covenant to repair, reasonable wear and tear, excepted, &c., and in applying the evidence.

I think it is clear that John Bugg as an assign was not named in the covenant. The covenant, as found in the second column of the statutory form R. S. O. p. 989 is: "7. And also *that the lessee* shall not nor will during the said term assign," &c. The form of covenanting words introduced into the lease by the conveyancer, as set out in the judgment, does not aid the defendants' contention.

As to whether the covenant is one running with the land, may be more open to question.

In *Lee v. Lorsch*, 37 U. C. R. 262, Richards, C. J., states the result of the authorities to be, that it was not; and Wilson, C. J., rather indicated an opinion that it was; and the same learned judge in *Toronto Hospital Trustees v. Denham*, 31 C. P. 203, 208, seems to think the question settled by *Williams v. Earle*, L. R. 3 Q. B. 739, to the effect that it did run with the land.

The learned judge below has adopted the view of Richards, C. J., as expressed in *Lee v. Lorsch*; and I think I will

be exercising a wise discretion in declining, while sitting alone, to interfere, leaving myself quite at liberty to express an opinion if the point is raised when I am sitting with my brother judges in the Divisional Court.

While I do not consider that *Lee v. Lorsch* decides the point so as to bind me, even if I differed from the view adopted by the learned county judge—I do not say I do—I think I ought not, under the circumstances, to reverse his judgment.

If therefore there was no breach of that covenant, was the plaintiff entitled to recover for breach of the covenant to repair?

This was treated as running with the land and binding on John Bugg. He assigned the lease to his son Charles in December, 1882; and the learned Judge held that his liability then ceased.

It was urged that the non-notification of the landlord prevented the assignment operating. This was put, as I understood it, on the ground of estoppel. No authority was cited for the proposition, and I do not think it tenable.

The learned judge further found as a fact that the evidence did not disclose the date when the alleged grievances arose; and therefore he was unable to find that such (if any) as were actionable arose prior to the assignment.

If not, then the plaintiff fails entirely; for I quite agree with the conclusion arrived at by the learned judge as to the claim for waste. I think he has properly construed sec. 9 of R. S. O. ch. 107. See *Clegg v. Grand Trunk R. W. Co.*, 10 O. R. 708. The evidence is not of a nature to enable me to interfere with the findings of fact, or indeed to desire to do so.

I do not find it necessary to refer more at length to the many questions discussed and determined in the able and exhaustive judgment of the learned judge, which has saved me much labour in a most laborious case.

The motion must be dismissed, with costs.

Motion dismissed.

[COMMON PLEAS DIVISION.]

IN RE SMITH AND THE CORPORATION OF THE TOWNSHIP
OF PLYMPTON.

Arbitration and award—Consolidated Municipal Act, 1883—Arbitration clauses — By-law appointing arbitrator — Sufficiency of — Arbitrator refusing to act, award by other two—Revoking arbitrators authority—Appointment of third arbitrator by judge—Meeting of arbitrators within twenty days—Oath.

A township by-law after reciting that there was a difficulty with S. "from alleged damage from water flowing from local drains known as the H. and S. drains," enacted that F. was appointed arbitrator for the township. The notice given by the reeve to S. was, that "the corporation has elected that the claims made by you for damages to the east half of lot 11," &c., "on account of the construction of the drain from P. to the S. drain, or consequent thereon, shall be referred to arbitration." Before the parties had been heard on the merits, the plaintiff's arbitrator withdrew from the arbitration and refused to act; but the other two arbitrators notwithstanding proceeded with the reference and made an award.

Held, that the reference was wholly informal, the subject thereof not being properly defined; and though the notice given by the reeve to S. would make the matter sufficiently clear it could not affect S. for he never entered upon the arbitration, but repudiated the arbitrator's authority at the first meeting of which he had notice; but, even if the reference were sufficient, the award was bad by reason of the two arbitrators proceeding alone, the Municipal Act requiring (in the absence of a special agreement to refer) that there shall be three arbitrators continuing to act from the time of appointment until the award has been made, and enabling the County Court Judge to appoint another arbitrator in the place of one refusing or neglecting to act.

Quære, whether it was in the power of either party to the reference to revoke the authority of the arbitrators.

Semble, that the provisions in the statute that the arbitrators must hold their first meeting within twenty-days from the appointment of the last arbitrator is not imperative, but directory, merely; and therefore an omission to hold such meeting within such time would not invalidate an award made within the month as required by the Act.

Semble, also, that the County Judge may appoint the third arbitrator *ex parte* although this is not desirable; and that the power to appoint does not depend on the disagreement of the two arbitrators, but on their failure to agree within the seven days limited therefor.

It was objected that the arbitrators had not taken the oath required by the statute; but, *Semble*, this objection was not tenable, as the oath they took was substantially the same as that required.

On 29th January, 1886, *Aylesworth* moved, pursuant to notice of motion, on behalf of Frank Smith, to set aside an award, dated 29th October, A.D., 1885, in the matter of the arbitration between Frank Smith and the corporation of the township of Plympton, under and pursuant to the

provisions of the Municipal Act, made by Robert Fleck and Robert Rae, two of the arbitrators in the said matter, on the following grounds: (1) The arbitrators did not within twenty days after the appointment of the third arbitrator meet at any place to hear and determine the matter in dispute; (2) The third arbitrator was appointed at the instance of the corporation without the consent of the said Smith, and without any notice to him or any one on his behalf, and without there having been in fact a failure by the two arbitrators originally appointed to agree upon a third arbitrator; (3) The arbitrators did not before proceeding to try the matter of the arbitration take and subscribe the oath in that behalf in the form prescribed by the Municipal Act, 1883; (4) The arbitration proceedings were unnecessarily and improperly instituted by the corporation, inasmuch as at the time of the appointment of its arbitrator an action in the High Court of Justice had been brought by the said Frank Smith against the township, and was then depending in the said court in which the defendants had then delivered their statement of defence, in which action all questions arising or that could arise upon the arbitration could have been much more cheaply, expeditiously and satisfactorily determined.

From the affidavits and papers filed it appeared that Robert Fleck was appointed arbitrator on behalf of the corporation under the following by-law:

“Whereas, there is difficulty with Mr. Smith, of Enniskillen, from alleged damage from water flowing from local drains known as the Hunter and Stonehouse drains: Be it therefore enacted by the council of the township of Plympton, that Robert Fleck, Esq., of the township of Moore, is hereby appointed arbitrator on the part of the township of Plympton, and the clerk shall notify him of the same under the seal of the township. Passed 23rd day of August, 1885.”

This by-law was sealed with the corporate seal of the township, and signed by the reeve and clerk.

On or about the 22nd day of September, 1885, the said Frank Smith was served with the following notice:

Take notice, that the municipal corporation [of the township of Plympton have elected that the claims for damages to the east half of the west half of lot 11 in the 13th concession, Enniskillen, made by you on the said corporation on account of the construction of a drain from the township of Plympton into the Stonehouse drain in the township of Enniskillen, or consequent thereon, shall be referred to arbitration; and the said council has by by-law appointed Robert Fleck of the township of Moore, in the county of Lambton, their arbitrator in this respect; and that this notice is given in pursuance of the Consolidated Municipal Act, 1883. Yours, &c.,

“ W. H. McMAHON, Reeve of Plympton.”

After some correspondence as to the regularity of this notice between the solicitors for Smith and the corporation, on the 23rd September, 1885, the following notice was served on behalf of Smith on the corporation :

“ Take notice, that I have appointed James Kerr * * as my arbitrator in respect of the claim made by me on the township of Plympton * * for damages on account of the construction by the said corporation of the drain in the pleadings mentioned from the township of Plympton * * into the Stonehouse drain in the township of Enniskillen, and continuing thence to my lands in the said pleadings mentioned, being the east half of the west half of lot No. 11 in the 13th concession of the said township of Enniskillen, and consequent thereon ; and this notice is given in pursuance of the provisions of the Consolidated Municipal Act, 1883. Dated 23rd day of September, A. D. 1885.

“ FRANK SMITH,

“ By STEPHEN FRASER GRIFFITH, his Attorney.”

On the 25th September, Mr. Kerr wrote to Mr. Fleck that he had accepted an appointment to act with the latter on a court of arbitration in the matter of *Smith v. Plympton*, and asked to have a meeting to consult as to the appointment of the third arbitrator. To this letter Mr. Fleck replied on the 29th September, 1885 :

“ I shall come to Petrolea on the afternoon of the 1st October and see you.”

Kerr the arbitrator made an affidavit in which he swore that, on the 1st October, 1885, the said Fleck called on him in Petrolea, and after talking the matter of the arbitration over for a short time, he said he could not do anything definite until he had communicated with William McMahon, the reeve of the township of Plympton, as, although he had

received notice of his appointment, he did not know anything more of the matter, and that he would be in Sarnia the following Saturday, the 3rd day of October, and would telephone him (Kerr) from there as to a further consultation in regard to the appointment of a third arbitrator; and that it was distinctly understood between them that they should meet again for the purpose of appointing a third arbitrator: that Fleck did not again communicate with him in relation to the appointment of a third arbitrator; and on Monday, the 5th day of October, he heard that a third arbitrator had been appointed on the 3rd of October by the judge of the County Court of Lambton, on the application of Mr. Lister, solicitor for the corporation: that the said arbitrator was Robert Rae, reeve of the township of Bosanquet, and he would not have consented to the appointment of the said Rae.

On the 6th October, Fleck wrote to Kerr:

“Owing to the rain I could not go to Sarnia on Saturday, and informed Lister & Cowan we had not chosen a third man. They applied, I am told, to the judge, who appointed Mr. Rae. We will require to meet in twenty days and make our award within a month. When, and where, should we meet?”

This letter Kerr swore he received on or about the 8th of October; and on the 15th October Fleck again called on him, and they agreed in writing to meet on the premises in question for the purpose of viewing the same on the 24th day of October.

The writing was as follows:

“In the matter of the arbitration between Frank Smith, of the town of Petrolea and the corporation of the township of Plympton.

“The undersigned arbitrators agree to meet on the ground concerning the matter in dispute on Saturday, the 24th day of October, 1885, at the hour of one o'clock in the afternoon.

“R. FLECK,
“JAMES KERR.”

Petrolea, October 15th, 1885.

On the said 24th October Fleck and Kerr met on the premises, and Fleck informed Kerr that he had given Rae ample notice of the appointment to enable him to

attend, and also that he and Rae had made an appointment for all the arbitrators to meet at Sarnia, on the 28th day of October, for the purpose of hearing and determining the matter, and that the witnesses of the corporation had been served with subpoenas to attend thereon. And Kerr swore that the said appointment was made without his knowledge, and without any consultation with him; and he objected thereto, on the ground it would be more convenient and less expensive to all parties to meet at Petrolea. To this view Fleck yielded, and an appointment for the 29th day of October was drawn up and signed as follows:

"We, the undersigned arbitrators, having met this day by agreement in writing at Petrolea, and proceeded to view the lands and drain, the subject of this arbitration. Mr. Rae was absent. We adjourned, to meet again at the Mechanics' Institute office in Petrolea, on Thursday, the 29th day of October inst., at ten o'clock A. M.

"R. FLECK,

"JAMES KERR."

On the 29th October all three arbitrators assembled at Petrolea. Mr. Fleck was appointed chairman, and called on Mr. Griffiths, solicitor for Smith, to proceed with his case, whereupon Mr. Griffiths informed the arbitrators that they were *functi officio*: that he repudiated the whole arbitration, and would treat the arbitration proceedings as entirely at an end, and withdrew from the room; and Kerr also withdrew before any further proceedings had been taken.

On the 30th day of October, Griffith served formal notice on Kerr, and on Messrs. Lister & Cowan, solicitors for the corporation; and mailed in a registered letter like notices to the arbitrators, Fleck and Rae, of his repudiation of the arbitration proceedings and any award they might make, on the ground that no appointment had been made by the arbitrators or meeting held within the time limited by the Consolidated Municipal Act of 1883.

Robert Fleck, the arbitrator of the corporation, made an affidavit setting out the proceedings of himself and the arbitrators, and stated what took place between him and

Kerr at the meeting on the 1st, 24th and 29th of October, as follows :

“ On the first day of October last the said Kerr and myself met at the town of Petrolea for the purpose of appointing a third arbitrator, but were unable to agree in selecting a person, and no appointment was made. I thereupon informed Mr. Lister, the solicitor for said township, of our failure to agree ; and, I am informed and believe, that the judge of the County Court of the county of Lambton on the third day of October last past appointed Robert Rae, of the village of Thedford, banker, and reeve of the township of Bosanquet, third arbitrator. On the 24th day of October, pursuant to appointment, Kerr and myself met at Petrolea, and we were met by said Frank Smith, who provided a carriage for us, and we went to the lands in question and met the said Smith (who preceded) there, and he shewed us the drain complained of, and he explained his claim, and on our return the same day we subscribed and took the oath prescribed by section 399 of the Consolidated Municipal Act, 1883, a true copy of the memorandum of such visit made by me is hereto annexed, marked Exhibit E.”

The memorandum was as follows :

“ Pursuant to the foregoing appointment, the arbitrators met at Petrolea on the 24th of October. Present—James Kerr and R. Fleck, and being duly sworn before a justice of the peace, proceeded to view the farm at the hour of one o'clock. Mr. Rae was not present, although he had been notified by letter of the meeting. Mr. Frank Smith the party accompanied us over the land, and shewed us the drain complained of, which we carefully examined. Owing to the absence of Mr. Rae, the third arbitrator, whom we learned was in Michigan on business, we adjourned till the 29th of October, at the Mechanics' Institute rooms, at the hour of ten A.M.

PETROLEA, October 24th, 1885.

R. FLECK.

“ After such visit, on account of the absence of Mr. Rae, the said Kerr and myself agreed to adjourn, and did adjourn the hearing of the said matters until the 29th day of October, at the Mechanics' Institute, in the town of Petrolea, at the hour of ten o'clock in the forenoon, notice whereof was given to said Smith.

“ On the said 29th day of October the arbitrators, Rae and Kerr, met, as I am informed and believe, at the said Institute, and adjourned until one o'clock in the afternoon. A memorandum of this meeting and adjournment in the handwriting of Kerr was made by Kerr, a true copy of which is now shewn to me, marked Exhibit F, which was as follows :

PETROLEA, October 29th, 1885.—11 A.M.

Arbitrators met pursuant to adjournment. Present—Messrs. Rae and Kerr. The parties not being ready the court adjourned till one o'clock A.M. At one o'clock the said Rae and myself attended,

and, for the convenience of all parties, adjourned until two o'clock in the afternoon, to meet at the council chamber, and at such adjourned meeting all the arbitrators were present. The said Smith then asked for a further adjournment until three o'clock of the same day, which was granted. At three o'clock, all the arbitrators being present, Mr. Griffith, acting for the said Smith, stated that he would not offer evidence, as he considered the arbitrators *functi officio*. Thereupon, the said Kerr being still present, adjourned, to meet again at the same place at thirty minutes past five o'clock in the afternoon of the same day; and in the meantime we decided to again view the farm and drain complained of. The said Rae and myself did go and view the said drain, and carefully examined the same, and signed a memorandum of what we had seen there, a true copy of which is now shewn to me, and marked as Exhibit G. Mr. Rae and myself met at the council chamber pursuant to adjournment, Mr. Lister being present and Mr. Griffith being absent, when Mr. Lister asked leave to have some witnesses examined under oath, and some evidence was thereupon given, a true copy of which evidence is now shewn to me, and marked Exhibit H. On the 29th day of October an award in the said matter was made, which is now shewn to me, and is marked Exhibit Ha. After the said award was drawn up, and before publication, I went to Kerr and carefully read it over to him, and asked him to sign the same, but he declined doing so."

In paragraph 15 of his affidavit he further deposed:

"I have read a copy of the affidavit of James Kerr filed herein. With reference to the 5th and 6th paragraphs I deny that there was any arrangement between the said Kerr and myself, express or implied, that there should be any further consultation as to the appointment of a third arbitrator. What did take place was as follows: We met, and a number of persons, including three County Court judges, were named by me, and a number of other persons were named by Mr. Kerr, and we each refused to accept of any of the nominations. Mr. Kerr then said: "What shall we do about it?" I said I suppose the county judge will have to make the appointment. The said Kerr replied: 'I suppose so, and I suppose he will appoint a fit person.' I then rose to leave, and he said: 'When will I hear from you again?' I said: 'I expect to go to Sarnia Saturday,' when Mr Kerr said: 'You might telephone me.' I said: 'Very well.' (16.) Before leaving I told the said Kerr that I would write to the reeve of Plympton informing him of our failure to agree, and thereupon did so write, and left the said letter with Kerr to be mailed. After said last-mentioned meeting we could not appoint an arbitrator, as the time limited by statute for such appointment had, I verily believe, expired. (18.) Said Frank Smith on said 29th day of October, when asking for an adjournment till three o'clock, said he had a number of witnesses present to be examined in this matter: that his solicitor could not be present until three o'clock; and he did not want the case to go on until his aforesaid solicitor was present."

In reply Kerr made an affidavit, in which he deposed that Robert Rae was not present when he, Kerr, was asked by Fleck to sign the award; and he reiterated the statement in his former affidavit that although Fleck had received notice of his appointment as arbitrator, he said he knew nothing more of it and could not make any definite arrangements respecting it until he had seen or heard further from Mr. McMahon, the reeve of Plympton: that we each mentioned several persons for the position of third arbitrator, but no appointment was made or agreed upon, and we parted with the distinct understanding that we should meet again for the purpose of appointing a third arbitrator; and that the said Fleck did hand me a letter, addressed to the said McMahon, which he requested me to, and which I did, mail for him, and in which, he informed me, he had told the said McMahon that we had not yet agreed upon a third arbitrator.

There were conflicting affidavits filed upon the merits.

The drain complained of by the said Smith was constructed under a by-law passed by the council of the corporation of Plympton on the 20th of April, 1883, which authorized the construction of a drain from a point on the line between lots 13 and 14 in the 1st concession of Plympton to lot 11 in the 13th concession of the township of Enniskillen. The plaintiff was the owner of the east half of the west half of lot number 11 in the said 13th concession of Enniskillen. It did not appear from the by-law or report of the engineer on which the by-law was passed, that he would be either benefited or injuriously affected by the drain; and the claim he made in the statement of claim, filed in the action brought by him against the corporation was for damages sustained by his land being overflowed by the water brought there by the drain, destroying crops and injuring his oil wells, and for destroying a bridge of the plaintiff's while the corporation was constructing the drain.

On January 29, 1886, *Aylesworth* supported the motion.
Lash, Q.C., contra.

May 11, 1886. CAMERON, C.J.—It is not by any means clear that the provisions respecting arbitrations contained in the Municipal Institutions Act, 1883, apply to the circumstances of the present case.

They are, as far as necessary to be considered on this motion, the following :

Sec. 393. "In case of an arbitration between a municipal corporation and the owners or occupiers of, or other persons interested in real property entered upon, taken or used by the corporation in the exercise of any of its powers, or injuriously affected thereby, if after the passing of the by-law, any person interested in the property appoints and gives due notice to the head of the council of his appointment of an arbitrator to determine the compensation to which such person is entitled, the head of the council shall, if authorized by by-law, within seven days appoint a second arbitrator, and give notice thereof to the other party, and shall express clearly in the notice what powers the council intends to exercise with respect to the property, describing it."

"Sec. 394: "In any such last mentioned arbitration, if after service on the owner or occupier of, or person so interested in the property, of a copy of any by-law certified to be a true copy under the hand of the clerk of the council, the owner or occupier or person so interested omits for 21 days to name an arbitrator and give notice thereof, as aforesaid, the council or the head, if authorized by by-law, may name an arbitrator on behalf of the council, and give notice thereof to such owner, occupier or person so interested, and the latter shall within 7 days thereafter name an arbitrator on his behalf."

Sec. 396: If any such owner, occupier or person so interested, or the head of any such council, whether from want of authority in that behalf, or otherwise, omits to name an arbitrator within 7 days after receiving notice to do so; * * * or if the two arbitrators do not within 7 days from the appointment of the lastly named of the two arbitrators agree on a third arbitrator, or if any

of said arbitrators refuse or neglect to act, the judge of the County Court of the county in which the property is situated, on the application of either party, shall nominate as an arbitrator a fit person resident without the limits of the municipality in which the property in question is situated, to act for the party failing to appoint, or as such third arbitrator, or in the stead of the arbitrator refusing or neglecting to act, and such arbitrators shall forthwith proceed to hear and determine the matters referred to them."

Sec. 397: "In any of the cases herein provided for the arbitrators shall make their award within one month after the appointment of the third arbitrator."

Sec. 399: "Every arbitrator before proceeding to try the matter of the arbitration, shall take and subscribe the following oath" (or "affirmation") : 'I, (A. B.,) do swear (or affirm) that I will well and truly try the matters referred to me by the parties, and a true and impartial award make in the premises, according to the evidence and my skill and knowledge.'

Sec. 400: "The arbitrators shall within 20 days after the appointment of the third arbitrator, meet at such time and place as they may agree upon, to hear and determine the matter in dispute, with power to adjourn from time to time, and shall make their award in writing, and if the arbitration is respecting drainage works, in triplicate, which shall be binding on all parties, and one copy thereof shall be filed with the clerk of each of the municipalities interested; and one shall, in case the arbitration is respecting drainage works aforesaid, be filed with the registrar of deeds for the county or other registration division in which the lands affected are situate."

Sec. 402: "In case of a difference between the arbitrators, the decision of the majority of them shall be conclusive."

Sec. 404. "In case the award relates to property to be entered upon, taken or used as mentioned in sect. 393, and in case the by-law did not authorize or profess to authorize any entry or use to be made of the property before an award has been made, except for the purposes of survey,

or in case the by-law did give or profess to give such authority, but the arbitrators find that such authority had not been acted upon, the award shall not be binding on the corporation unless it has been adopted by by-law within six weeks after the making of the award; and if the same is not so adopted the original by-law shall be deemed to be repealed, and the property shall stand as if no such by-law had been made, and the corporation shall pay the costs of arbitration."

Sec. 405. Every award made under this Act shall be in writing under the hands of all or two of the arbitrators, and shall be subject to the jurisdiction of the High Court of Justice, as if made on a submission by a bond containing an agreement for making the submission a rule or order of such court."

The by-law for the construction of the drain does not claim on behalf of the corporation the right to enter upon use or injuriously affect the land of Smith, nor does the notice given on behalf of the corporation define or express what powers the corporation intends to exercise.

Under section 393 the arbitrator is appointed to determine the compensation to which the owner, occupier, or person interested in the real property is entitled to by reason of the exercise by the corporation of any of its powers, that is to say, of the powers of taking, entering on, or injuriously affecting lands by any of its lawful works. Under that section the person claiming to be injured takes the initiative, and, unless he does take the initiative, an arbitration does not take place unless the requirements of section 394 are observed; that is to say, if the corporation desires to avail itself of the right to have the compensation to be paid determined by arbitration, it must proceed by serving a copy of the by-law upon the owner, occupier or person interested in the property, and then if such owner, occupier or person interested omits for twenty-one days to name an arbitrator, the council, or head, if authorized, may name an arbitrator, and the owner, occupier or person interested shall, within seven days thereafter, name an arbitrator in his behalf.

There was nothing of this kind done in the present case. The proceedings seem to have been taken with much want of care. First, the by-law authorizing the appointment of an arbitrator is inartificial and bald. It simply recites that "there is difficulty with Mr. F. Smith from alleged damage from water flowing from the local drains known as the Hunter and Stonehouse drains; and then enacts that Robert Fleck is appointed arbitrator on the part of the township of Plympton," without defining what the arbitration is to be about; no reference is made to the by-law under which the work was done, or that the reference was to determine the compensation to which Smith was entitled for lands taken, entered upon, used or injuriously affected.

Then the notice given by the reeve to Smith of the appointment of Mr. Fleck as arbitrator was: "The corporation has elected that the claims made by you for damages to the east half of the west half of lot 11 in the 13th concession, on account of the construction of the drain from Plympton to the Stonehouse drain, or consequent thereon, shall be referred to arbitration." Now the claim for damages made by Smith was for past damages. The authority given by the Act is not to arbitrate in respect of such a claim, but as to the compensation to which Smith is entitled for the injury to him for all time by reason of the exercise of the corporate powers injuriously affecting his lands.

To bind the corporation to an arbitration in respect of the action there would have to be a formal submission under the seal of the corporation.

I am of opinion the reference, under the circumstances, was wholly informal; but, treating it as a reference under the statute, I think the proceedings have been irregular and void.

The notice given to the arbitrators by Smith's solicitor was a revocation of their authority. Such a submission is not made irrevocable by the Municipal Act nor by the Common Law Procedure Act.

By sec. 204 of the latter Act, R. S. O. ch. 50, it is pro-

vided: In case of the appointment of any referee, arbitrator, or umpire * * by or in pursuance of any submission or reference, not containing words purporting that the parties intended that such agreement should not be made a rule or order of any such Superior Courts, the power and authority of such referee arbitrator shall not be revocable by any party to the reference, without leave of the court * * mentioned in the submission; or in case no court is mentioned in the submission * * then not without the leave of one of such Superior Courts, or of a judge thereof, and the referee arbitrator, and umpire shall proceed with the reference notwithstanding any such revocation, and make an award, although the person making such revocation does not afterwards attend the reference."

This can only have relation to a submission or agreement of reference where the arbitrators are named therein; and while under section 405 of the Municipal Act 1883, jurisdiction is given to the High Court of Justice over an award in the same way that it would have were the submission by a bond containing an agreement for making the submission a rule of court, the common law right of the parties to revoke is not interfered with.

By section 13 of the English Common Law Procedure Act of 1854, 17 & 18 Vic. ch. 125, one of the parties under an agreement to refer is empowered, in case the other party fails to name an arbitrator, to appoint his own arbitrator as sole arbitrator, and makes the award of such arbitrator binding, and gives the like power to the court or Judge to revoke the appointment that is given to the court or Judge under section 204 of R. S. O. ch. 50.

It was held in *Fraser v. Ehrensperger*, 12 Q. B. D. 310; that an appointment so made could before award be revoked by either party.

This is an authority for the position that a reference under the direction or terms of an Act of Parliament does not interfere with the parties' common law right of revocation. It is, however, in effect, rendering nugatory the provisions of the Act in a case like the present. Because

if such right exists, it would be impossible to get an award made under the Act, if either party to the reference desires to prevent it by revoking from time to time the authority of the arbitrator or arbitrators.

In this case, however, it appears to me that, assuming it was not in the power of either party to revoke the authority of the arbitrators, the requirements of the arbitration clauses of the Municipal Act have not been complied with, and the award is invalid in consequence.

The Act requires, in the absence of a special agreement to refer, that there shall be three arbitrators continuing to act from the time of their appointment until the award has been made. It contemplates the refusal, and also the neglect, of an arbitrator to act, and enables the Judge of the County Court to appoint another arbitrator in the place of the arbitrator refusing or neglecting to act. The language "refusing or neglecting" to act used in section 396 in connection with the declaration that such arbitrator, that is to say the party appointed arbitrator, who continues to act, if one does continue, with the arbitrators appointed by the Judge, or all the arbitrators, if all appointed by the Judge, shall forthwith proceed to hear and determine the matters referred to them, shews, I think, that the Legislature contemplated the refusal or neglect of an arbitrator to act after the reference had been entered upon, as well as the case of an arbitrator refusing to accept the appointment.

What took place when Mr. Griffith announced that the arbitrators were *functi officio*, and he would not further proceed with the reference by the withdrawal of Mr. Kerr, Mr. Smith's arbitrator, was equivalent to a refusal on the part of Kerr further to act. The other arbitrators then had no right further to proceed till another arbitrator had been appointed. There was no reference to two arbitrators. It was to three; but in case of difference between the three the majority's decision was to be conclusive. No difference of opinion arose between the arbitrators upon the matters submitted. They had not heard the parties on the merits.

For these reasons I am of opinion the award must be

set aside, with costs. It is, therefore, not absolutely essential to decide the more technical questions raised by the motion. The first of these is: the arbitrators did not meet within twenty days after the appointment of the third arbitrator at any place to hear the matter in dispute as required by section 400 of the Municipal Act, 1883.

The validity of this objection depends upon the proper construction to be given to the clause.

Is the clause directory merely, or does it prescribe an act to be performed essential to the continuance of the power and authority of the arbitrators to arbitrate?

The object of the Legislature in making the several limitations of time was doubtless to secure promptness and expedition in the decision of the questions submitted to arbitration. This is manifested by the limit of twenty days for the commencement of their duties by the arbitrators, and the further limit of the time for making their award to one month. If the limit of twenty days is to be treated as merely directory, the power of the arbitrators would exist indefinitely and apparently without there being any power to compel them to act, and the very object of the Legislature in enacting the time for meeting would be defeated. To hold it not directory also works delay, and prevents prompt decision, as there would have to be a reappointment of arbitrators and the loss of time consequent thereon, so that it cannot be said the legislation upon the subject leaves the matter in a satisfactory condition which ever view may be adopted.

I had occasion to consider the effect of not making an award within the month: *In re Corporation of Muskoka and Corporation of Gravenhurst*, 6 O. R. 352. The inclination of my mind then was, that an award made after the month expired would not be invalid, and to regard the direction as directory only in its effect upon the rights of the parties while it imposed an imperative duty upon the arbitrators to make their award within the time limited, and subjected them to any consequences that might flow from a breach of such duty.

In the *Township of Thurlow v. Township of Sidney*, 29 Gr. 497, Mr. Justice Proudfoot was of opinion that reading sections 377 and 380 of R. S. O. ch. 174, together their combined effect would enable arbitrators to enlarge the time for making their award beyond the month, and an award made within the enlarged time would be valid. But he did not so decide, as the award was upheld on the ground that the objection, if a valid one, had been waived by the parties attending before the arbitrators and going on with the proceedings after the time for making the award had expired.

The current of English authority is, I think, against the validity of an award made after the time fixed by statute. If the statutory limit is exceeded then there is no limit, and the matter would be pending before the arbitrators as long as they refrained from making an award. This certainly would not be what was contemplated by the Legislature, and it is perhaps better to require that the award should be made within the month, unless the time is enlarged by the order of the Court or a Judge, than to tie the subject of such references up indefinitely.

Sections 377 and 380 are the same as sections 397 and 400 in the Consolidated Municipal Act, 1883.

If the time for making the award must be regarded as imperative so as to make an award made after the expiration of the month from the time on which the arbitrators enter upon the reference, it is difficult to say that the time for commencing the proceedings must not also be regarded as imperative.

I am inclined, however, to think, as it is purely a matter of formal procedure, it should be regarded as directory; and the omission to hold the first meeting within twenty days would not make an award, made within the month, invalid.

The time for making the award within a month is not put under the head of "procedure" while the time for holding the first meeting is, which may support an argument that the former is imperative and the latter directory.

I am therefore inclined to the opinion the first objection taken in the notice of motion, considered alone, should not be entitled to prevail.

The second objection taken by the notice of motion is, that the third arbitrator was appointed by the County Court Judge without notice being given of the application to the appellant Frank Smith; and there was no failure to agree upon such third arbitrator.

The statute is silent as to the way in which the matter is to be brought before the Judge.

Section 396 imposes upon him the duty, on the application of either party, of nominating an arbitrator. And so, if the Judge thinks fit, he may, I think, act without notice to the opposite party and may make the appointment *ex parte*. At the same time I think it most undesirable that such appointment should be made without hearing the parties to ascertain whether there is any good objection to the person he may determine to appoint. His duty is, to appoint a person resident outside of the municipality concerned in the arbitration. And it is his duty also not to appoint a ratepayer of the township, resident or non-resident; and there may be other valid objections that he can scarcely be expected to be aware of, as he cannot, being unremunerated for his services, be required to take the trouble of making enquiries outside of the qualification of his nominee to discharge the duties. This he may, from the standing of the party selected, be quite satisfied of; and still the person chosen might be an unsuitable person to be selected from circumstances that would not be within the knowledge of the Judge in the particular matter.

Then there was in fact a failure to appoint the third arbitrator within seven days after the appointment of the arbitrator last appointed, and so the circumstance had arisen which gave the Judge power under the statute to appoint, though the arbitrators may not have come to the conclusion that they would not be able to agree upon the third arbitrator.

The power of the Judge to appoint does not depend upon

their disagreement, but upon their failure to agree upon such arbitrator within the time limited.

The language of the statute is, "if the two arbitrators do not within seven days from the appointment of the lastly named of the two arbitrators agree upon a third arbitrator, the Judge of the County Court of the county in which the property is situated, on the application of either party, shall nominate a fit and proper person resident without the limits of the municipality, such third arbitrator:"

Strictly the second ground also fails.

The third objection is the arbitrators did not before proceeding to try the matter of the arbitration take and subscribe the oath in that behalf prescribed by the Municipal Act.

This is not a valid objection, as the oath of the arbitrators was substantially the same as that prescribed.

The last objection is that the arbitration proceedings were unnecessarily instituted, an action having been commenced in the High Court of Justice.

There would be nothing in this objection if there had been a valid submission of the matter involved in the suit, and the corporation had the right to have the matter decided by arbitration. But for the reasons already given, I think there was no proper and valid submission in this case, the subject of the reference not being sufficiently defined. The by-law of the corporation appointing the arbitrator to act on behalf of the municipality should have defined in terms what was referred, so that there would have been something definite to which the oath of the arbitrators would relate. They swear each for himself that he will truly try the matters referred to him by the parties. And all that the arbitrator of the corporation has to guide him is the recital in the by-law appointing him, that there is a difficulty with Mr. Frank Smith, of Enniskillen, from alleged damage from water flowing from local drains, known as the Hunter and Stonehouse drains. The notice afterwards given by the reeve would make the matter sufficiently certain; and had

Smith actually entered upon the arbitration it would perhaps not lie in his mouth to say there was no sufficient reference, but he did not enter upon the reference. On the contrary, at the first meeting of the arbitrators, of which he had notice, he repudiated their authority and right to proceed, and cannot, I think, be precluded from saying the arbitrators had no valid authority to act.

It is fair to assume that the corporation in entering upon the reference intended to have ascertained what, if anything, the municipality was bound to pay for all past and prospective damages for injuries done, or which would continue to be done by the drains constructed by the corporation, but the action that had been brought by Smith was an action in respect of past and not prospective injury, and the difficulty that had arisen with him was in respect of such past injury; and it could not be said that the arbitrators would be empowered to award with regard to prospective injury the compensation to be paid. The reference was really therefore abortive.

But I base my opinion that the award must be held invalid on the ground of revocation of the arbitrators' authority, and on the irregularity of two of the arbitrators proceeding after the arbitrator appointed by Smith had withdrawn from the reference, and thereby refused to act.

The award must be set aside, with costs to be paid by the municipality.

There being, in my opinion, no sufficient submission under the statute I must decline to refer the matters back to the arbitrators. In fact there are no arbitrators to whom it could be referred back until an arbitrator has been named to take the place of James Kerr, Smith's arbitrator.

It is open, I assume, to the corporation on taking the proper steps to do so should all matters not be settled in the pending suit to have a fresh reference, if so advised.

Motion allowed.

[QUEEN'S BENCH DIVISION.]

RYAN V. THE BANK OF MONTREAL.

Bill of exchange—Forgery of drawer's name—Estoppel—Forgery of payee's name—Action to recover back amount of forged bill—Laches.

The plaintiff made an arrangement in T. with Y., an employee of a certain company, to discount their draft on B. & Co., for \$4989.65, at three months, and in pursuance of this arrangement a draft was drawn in H. by Y., in the company's name, on plaintiff, payable on demand to their own order, for \$4800, dated 23rd July, 1883. This draft was taken by Y. to defendants banking house at H. and there discounted by him, and the proceeds drawn by cheques in the name of the company. The draft was then forwarded by the defendants to their branch in T., and by them presented to plaintiff for acceptance and payment. Plaintiff then discounted the first mentioned draft with the defendants at T., and with the proceeds paid the draft for \$4800. Plaintiff, about 11th September, 1883, discovered that both drafts had been forged by Y. and immediately notified defendants, at the same time demanding payment of the amount of the forged draft for \$4800, which was refused by defendants. Plaintiff paid the first mentioned draft at maturity :

Held, that although plaintiff, by acceptance and payment, was estopped from disputing the signature of the company, the drawers, yet he was not estopped from denying their signature as endorsers, even though it was on the bill at the time of acceptance and payment.

Held, also, that defendants having no title to the bill, the endorsement being a forgery, were not entitled to receive payment, and having been paid plaintiff was entitled to recover back the amount so paid.

Held, also, that plaintiff had not lost his right of action by his delay in discovering the forgery, there being no actual genuine party on the bill against whom defendants could have recourse, and no remedy having been lost by them by such delay.

Action to recover from the defendants money paid by the plaintiff to the defendants.

The statement of claim shewed that one J. M. Young, on the 23rd July, 1883, purported to draw upon the plaintiff a bill of exchange in the name of the Hamilton Cotton Company for \$4,800, payable, on demand, to their own order: that on 24th July defendants presented the bill, purporting to be duly endorsed by the Cotton Company by J. M. Young, to the plaintiff, in Toronto, who accepted and paid the same: that the bill of exchange was a forgery upon the Cotton Company: that plaintiff paid the bill in ignorance of the forgery and in the belief that the bill was a genuine bill: that soon after the payment of the bill

plaintiff discovered the forgery, and immediately notified the defendants of same, and demanded repayment of the money, but defendants refused to repay same: that plaintiff discovered defendants received the bill from the forger of it, and discounted the same for him, and paid him the proceeds thereof at their banking house at Hamilton before they presented the same to the plaintiff at Toronto: that defendants might, with ordinary diligence, have discovered the bill and the endorsement thereof were forgeries, and were guilty of negligence in taking same, and that having presented same to plaintiff, as a genuine bill, with a genuine endorsement, and having thereby obtained payment from plaintiff, defendants were under all the circumstances aforesaid bound to repay the same to plaintiff.

Statement of defence :

That defendants received and discounted the bill believing it to have been drawn and endorsed by the Hamilton Cotton Company, and paid the proceeds thereof upon checks purporting to be signed by said company, and believing the signatures thereof to be the genuine signatures of that company, and they were not guilty of any negligence in receiving and discounting the bill, or in paying the proceeds thereof: that defendants presented the bill to plaintiff for payment believing same to be genuine, and plaintiff paid same to defendants upon presentation, and defendants had no notice or knowledge that the bill was forged until about the 11th of September, 1883: that plaintiff, by paying the bill to defendants, thereby admitted same to be genuine, and having paid same could not recover the amount thereof from defendants, who received such amount from plaintiff in good faith, believing the bill to be genuine: that plaintiff was precluded by his laches and delay from recovering from the defendants.

Issue.

The action was tried last Autumn at Toronto, before Galt, J., without a jury.

The plaintiff said, in his evidence, that Mr. Clarkson called upon him and asked him if he would discount a bill

drawn by the Hamilton Cotton Company upon J. P. Billups & Co., of New York, and that Hamilton Young saw him about it also on the same day : that he made enquiries and found that Mr. Lucas and J. M. Young were the partners of that company, and their standing was satisfactory : that the bill was the one for \$4,989.65, and Ryan discounted it at the Bank of Montreal : that it was dated the 18th July, 1883, and with the proceeds he paid the draft now in question for \$4,800, dated 23rd July, 1883, payable on demand, drawn upon Ryan : that he (plaintiff) had to pay the bill for \$4,989.65, because he had endorsed it : that both bills were forgeries : that the bill for \$4989.65 was discounted by the Bank of Montreal, and placed to his (plaintiff's) credit, and out of these proceeds he paid the bill for \$4,800 by cheques on the bank : that it was only Hamilton Young he saw on behalf of the Cotton Company.

For the defence :

John N. Travers, the manager of the defendants' bank at Hamilton, said that Hamilton Young generally came to the bank to do the business for the Cotton Company : that he (Travers) discounted the draft for \$4,800 in good faith, believing it to be genuine : that the charge for discount was \$61, and it was paid promptly in Toronto by the plaintiff : that there was another bill for \$5,110.40, dated 8th August, 1883, [discounted with defendants by Hamilton Young and the proceeds paid to him : that it was not connected with the bill in question : that the Cotton Company afterwards took it up and charged it against money of Hamilton Young at his credit in the company's books.

The learned Judge reserved the case for judgment, subsequently dismissing the action, with costs.

Notice of motion was served by the plaintiff to set aside the judgment for the defendants, and to enter it for the plaintiff, on the following grounds :

1. The plaintiff paid the money to defendants upon the bill under a mistake of fact, and without negligence, and was entitled to recover the same from the defendants.

2. The defendants were not entitled to retain the money paid upon a forged endorsement.

3. Had the defendants' manager at Hamilton examined the bill of exchange, having a knowledge of the signature of the Cotton Company, he would have discovered the forgery, and not have discounted it.

4. Defendants having discounted the bill before its acceptance were not entitled to have their loss already sustained made good to them by plaintiff.

5. Defendants were not prejudiced by the lapse of time between the forgery and its discovery, and lost no remedy thereby.

6. Defendants, by endorsing the bill in question, guaranteed the prior endorsements through which they claimed title.

7. The judgment for defendants was contrary to law, evidence, and the weight of evidence.

8. Upon the evidence judgment should have been given for plaintiff.

In Michaelmas Term last, *James MacLennan*, Q. C., supported the motion. Before this bill was presented to the plaintiff by the defendants for payment or acceptance, Hamilton Young, who forged the name of J. M. Young, a partner of the firm, to the bill, and who forged the endorsement also, had arranged with the plaintiff to discount the drafts of the Cotton Company in whose employment he was. The bill was paid by the plaintiff in July, and the forgery was not discovered until September, and it is said if there had not been so great a delay, the bank, if they had to refund the money, could have stopped sufficient money of Hamilton Young's in the Cotton Company's hands to have paid the amount of the bill. The defendants' title to the bill being only by and through the forgery, they had no right to demand or receive payment of it from the plaintiff, and having had no such right they are bound to refund it. The case cited by the defendants' counsel at the trial, of *Price v. Neal*, 3

Burr. 1355, has no application here. But see *Robinson v. Yarrow*, 7 Taunt. 455; *Smith v. Chester*, 1 T. R. 654; *Robarts v. Tucker*, 16 Q. B. 560-576; *Cooper v. Meyer*, 10 B. & C. 468; *Prescott v. Flinn*, 9 Bing. 19; *Beeman v. Duck*, 11 M. & W. 255; *Garland v. Jacomb*, L. R. 8 Ex. 216; *Canal Bank v. Bank of Albany*, 1 Hill 287; *Marriot v. Hampton*, 2 Sm. L. C. 8th ed. 421; *Jones v. Ryde*, 5 Taunt. 488. *Bell v. Gardiner*, 4 M. & G. 11; *Kelly v. Solari*, 9 M. & W. 54; *Townsend v. Crowdy*, 8 C. B. N. S. 477; *Byles on Bills*, Am. ed., from 13th London ed., pp. 83-84, 337-339; *Minet v. Gibson*, 1 H. Bl. 569, S. C. 3 T. R. 481; *Agricultural Savings & Loan Association v. Federal Bank*, 6 A. R. 192; *Bennett v. Farnell*, 1 Camp. 130, 180c; *Story on Contracts*, sec. 541.

Haverson, on same side. The bank manager at Hamilton who discounted the bill knew the company's signature, but did not notice it when he discounted the bill. He referred to *Wilkinson v. Johnson*, 3 B. & C. 428; *Chitty on Bills*, 13 Am. ed., 43,485; *Mackenzie v. British Linen Co.*, 6 App. Cas. 82.

Bruce, Q.C., contra. The plaintiff had never any dealings with the Cotton Company. He made his arrangements with Hamilton Young to discount for the company, and he should have made sure that Hamilton Young had the authority of the company to make the arrangement for them which he had made with the plaintiff. Ryan charged five per cent. for discounting, and when he was dealing with a clerk he should have suspected the clerk had no authority to bind his employers to discount at the rate of twenty per cent. per annum: *Price v. Neal*, 3 Burr. 1355; *Agricultural Loan Co. v. Federal Bank*, 6 A. R. 192. On the bill in question the signature of J. M. Young, as the member of the company, drawing for the company, and the endorsation "Hamilton Cotton Company, J. M. Y.", were forgeries: *Byles on Bills*, 339; *Smith v. Mercer*, 6 Taunt. 76. The plaintiff paid without accepting: *Cocks v. Masterman*, 9 B. & C. 902. The delay is a defence: *Bank of United States v. Bank of Georgia*,

10 Wheat. 333-348; *Cooper v. Meyer*, 10 B. & C. 468; *Henshaw v. Hortsman*, 11 How. Sup. Ct. R. 177; 2 *Daniells* on Negotiable Instruments, secs. 1360-1.

MacLennan, Q.C., in reply, referred to *Broom's Leg. Max.* last ed. 249; *Kelly v. Solari*, 9 M. & W. at p. 58.

June 29, 1886. WILSON, C. J.—The acceptance of a bill by procuration admits the drawer's handwriting and the procuration to draw, but it does not admit the endorsement was authorizedly made, although the endorsement is made by the same procuration, even although the endorsement was made before the acceptance: *Robinson v. Yarrow*, 7 Taunt. 455. For when the acceptor accepts he looks only to the handwriting of the drawer: it is on that account the acceptor is liable, even although the bill be forged: *Smith v. Chester*, 1 T. R. 654.

An insurance company accepted, payable at their own bankers, a draft of their agent, which was payable to the order of the persons who were entitled to the amount for loss. The agent delivered the draft accepted to the solicitor of the payees of the bill, and he forged the name of the payees specially to certain London bankers, who presented it to the bankers of the acceptors at maturity, who took it and debited the amount of the bill on the company's pass book, and delivered it to them, and they credited their bankers with the payment.

No objection was made till six months afterwards, when it was discovered the endorsements of the payees were forged by the solicitor, and the company were compelled to pay the insurance money to the proper parties. The company then sued the bankers for paying the bill upon the forged endorsement, and it was held that a banker cannot debit his customer with the payment made to one who claims by a forged endorsement, and so cannot give a valid discharge for the bill: *Robarts v. Tucker*, 16 Q. B. 560; *Cooper v. Meyer*, 10 B. & C. 468.

The case of *Beeman v. Duck*, 11 M. & W. 251, also shews that, although the acceptor is estopped from denying

the handwriting of the drawer, he is not estopped from denying the authority of the *endorsement*, although the endorsement is in the same writing as that of the drawers, the drawers being in that case the payees also of the bill.

It is also well settled that if one in possession, honestly, of a forged bill, discount it not knowing it to be a forgery, and the discounter of it discovers it to be a forgery, he can call upon the one who gave it to him to repay the amount which was paid upon it, and it makes no difference that the one who delivered it over to the discounter did not endorse it: *Jones v. Ryde*, 5 Taunt. 488. See also *Wilkinson v. Johnson*, 3 B. & C. 428.

In the case of *Price v. Neal*, 3 Burr. 1355, the acceptor paid one bill drawn upon him without acceptance, and a second bill drawn upon him similar to the first, which he accepted and afterwards paid. Both drafts upon him were forgeries: Held, he could not recover from the defendant the amount the plaintiff had paid to him in taking up the bills. The fault, such as there was, was that of the plaintiff.

That case is mentioned in several later cases, and it is said in them to have been decided upon the fact that the acceptor is bound to inform himself of the handwriting of the drawer. The report in Burrows implies that, but does not expressly state it: *Wilkinson v. Johnson*, 3 B. & C. at p. 434; *Jones v. Ryde*, 5 Taunt. at p. 492.

It appears then that an acceptor is bound to a genuine payee, and to all claiming title from him, from denying the genuineness of the signature of the drawer of the bill, even although the signature of the drawer be a forgery, but that he is not liable to any one claiming title upon a forged endorsement of the alleged payee of the bill, for he is not estopped from shewing that the person demanding payment from him has no title to make such demand.

The result is, the acceptor is not liable upon the bill when the first endorsement is a forgery, as in this case.

But there is a question of delay against the plaintiff in making his claim upon the defendants. As to that, I

should be disposed to hold the plaintiff, by his long delay in reclaiming the money, had lost his right of action against the defendants, if there had been any actual genuine party upon the bill to whom the defendants could have had recourse, and if they had by such delay lost such recourse; but there was no such person, nor was it shewn the actual forger of the bill could have made restitution to the defendants if they had been earlier notified of the claim, for it was not shewn nor alleged they had been damnified in any way by the delay of the plaintiff.

It may also be said for the plaintiff that there is as much reason to conclude the defendants from denying the endorsation to them by the alleged payees, who were at times customers of the defendants, and whose real signature the defendants' agent who discounted the bill had a knowledge of, as there is to conclude the plaintiff from denying the alleged drawing of the bill, because he afterwards paid the bill.

But there nevertheless is a difference between the parties. The defendants' agent dealt with the forger in other transactions as the accredited agent of the parties whose names he forged, the forger being the book-keeper and clerk of these persons; and all these other transactions were proper business matters, and the defendants' agent personally knew all these facts, while the plaintiff had no knowledge of the forger, more than he told of himself, and that was that he was the clerk of the house in Hamilton, a well-established mercantile firm there; nor did the plaintiff know anything of that house, but that it was of good standing and repute, and what the clerk told him of the business purposes of the house, which statement was wholly untrue, that the house desired to draw and the plaintiff to accept certain drafts, for which they were to pay the plaintiff five per cent. commission, or at the rate of twenty per cent. per annum, which was not the best recommendation of a house of good financial standing, and the plaintiff believed all that from the mouth of the clerk, without

ever communicating with the employer of the clerk on the subject. It may be fairly said, however, the plaintiff, by his credulity and want of ordinary business care and caution, is much to blame for bringing about this loss.

I am not able to say, however, that it is a defence to the action; for, although it was the original cause of the loss, it had nothing to do with the defendants' discount of the bill, who knew nothing of what had passed between him and the clerk, and the real position of the defendants is that they never had a valid title against the plaintiff upon the bill.

I have referred to most of the cases which were cited, but it is not necessary to refer to them more than I have done.

There is nothing the plaintiff has done to prevent his recovery of the money he has paid to the defendants by reason of their want of authority to receive it, excepting the delay in claiming it; but that, I think, is answered by the fact that the defendants had no recourse against any actual parties to the forged bill, and it does not appear they have lost the means of recovering against the actual forger of the bill by reason of such delay.

The order should, therefore, be absolute for the plaintiff for the amount of the bill, with interest, and the costs of the action and of this motion.

ARMOUR and O'CONNOR, JJ., concurred.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

IN RE SUMMERFELDT V. WORTS.

Gambling debt—Prohibition—Cheque—Note of hand—Division Court Act, sec. 53, sub-sec. 3.

A cheque given in settlement of losses at matching coppers is a note of hand given in consideration of a gambling debt within sec. 53, sub-sec. 3, R. S. O. ch. 47, and such a security is void under 9 Anne ch. 14, even in the hands of a *bonâ fide* holder for value.

Upon proceedings being taken in the Division Court, in an action in which that Court has not jurisdiction, the defendant is entitled to prohibition immediately upon the action being brought, and the fact of no notice of statutory defence being given under sec. 92 R. S. O. ch. 47, does not affect the defendant's right to prohibition.

THE plaintiff sued the defendant in the First Division Court of the County of York, to recover the amount of a cheque for \$200, drawn by the defendant on the Imperial Bank, payable to H. K. Dunn or order, and endorsed by Dunn, which was afterwards sold to the plaintiff by one Handscombe. The defendant gave notice disputing the claim and of intention to set up the defence that, under the Division Courts Act, sec. 53, sub-sec. 3, that Court had no jurisdiction to try the action, because the cheque sued on was a gambling debt. Thereupon the defendant applied to this Court for a *certiorari* to remove the said cause into this Court, which was refused. On 2nd December last the action came on for trial in the said Division Court, when it was objected that the Court had no jurisdiction to try the cause, as the cheque was given for a gambling debt; but the Court, no evidence having then been given of the fact, refused to give effect to the objection until evidence was given shewing the fact to be as stated. The plaintiff showed that he had purchased the cheque from one Hanscombe, and that he was a *bonâ fide* purchaser thereof for value, without notice of any illegality attaching to it. It was objected that the defendant was not at liberty to show that the cheque was given for a gambling debt, because this was a statutory

defence, and no notice had been given of it under section 92 of the Division Courts Act. The evidence of the defendant was, however, given, and he showed that the cheque was given for money lost by him to Dunn, the payee of the cheque, at matching coppers and for bets thereon. The learned Judge thereupon reserved judgment. The defendant then applied for a writ of a prohibition, and an order was made by Galt, J., that a writ of prohibition should issue.

May 21, 1886, *Reeve*, Q.C., moved by way of appeal from this order.

T. P. Galt, shewed cause.

June 29, 1886. ARMOUR,⁷ J.—By section 53 of the Division Courts Act, R. S. O. ch. 47, it is provided that the Division Courts shall not have jurisdiction in any of the following cases: (1) Actions for any gambling debt, or (2) actions for spirituous or malt liquors drunk in a tavern or alehouse, or (3) actions on notes of hand given wholly or partly in consideration of a gambling debt, or for such liquors.

The cheque sued on was undoubtedly given for a gambling debt, and it is, in my opinion, a note of hand.

The words “notes of hand” have no strictly legal signification, so far as I have been able to discover, and there is no reason, in construing this statute, to restrict them to promissory notes, but they may be well held to be all evidences of debt under the hand of the debtor, and to include cheques given by him.

In *Perry v. Maxwell*, 2 Devereux (North Carolina), 488, a testator bequeathed to certain legatees “all his notes of hand.” The court said “notes of hand may well include promissory notes, properly speaking, single bills and bonds. It is a name given generally by the unlearned, in common, to all those evidences of debt which are verified under the hand of the debtor, and which the creditor keeps.”

The cheque sued on was clearly void under the statute of 9 Anne, ch. 14, even in the hands of a *bonâ fide* holder

for value without notice; but it is said that no notice was given under section 92 of the Division Courts Act, that the defendant desired to avail himself of this statute, and that no evidence, therefore, could be given of a defence under this statute at the trial, and that therefore prohibition should not have been granted.

But the right to prohibition did not depend upon the giving of this notice, but upon the Division Court proceeding against the defendant in an action in which that Court had by law no jurisdiction, and the defendant was entitled to prohibition immediately upon the action being brought in that Court: *Re Mead v. Creary*, 8 P. R. 374.

In my opinion the motion must be dismissed, with costs.

O'CONNOR, J., concurred.

WILSON, C. J., not having been present during the argument, took no part in the judgment.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

REGINA V. BASSETT.

Hawkers and pedlars—Con. Mun. Act, 1883, sec. 495, sub-sec. 3, as amended by 48 Vic. ch. 40 (O.)—Conviction under County by-law—Exposing samples of cloth and soliciting orders for clothing—Meaning of term “dry goods” in amended Act.

Held, that under 48 Vic. ch. 40, sec. 1 (O.), amending sub-sec. 3 of sec. 495 of Con. Mun. Act, 1883, it is no offence to expose samples of cloth and solicit orders for clothing to be afterwards manufactured from such cloth, and to be then delivered to the persons giving such orders.

Held, also, that the term “dry goods” in the amended Act does not include clothing ordered to be manufactured from cloths, samples of which are exposed with a view to solicit orders for such clothing.

THE defendant, Richard Bassett, a commercial traveller for Robert Wallace, of the city of London, merchant tailor, was convicted on the 16th of March, 1886, before Robert Scott, Esquire, Mayor of the town of Galt, “for that the said Richard Bassett, on the 10th day of March, 1886, at the said town of Galt, not being a householder or permanent resident of the county of Waterloo, did, at the said town of Galt, carry and expose samples or patterns of dry goods, to be afterwards delivered to persons within the county, not being a wholesale or retail dealer in such dry goods, without having first obtained the license therefor by law required.”

The conviction was made under a county by-law passed in pursuance of sub-sec. 3 of sec. 495, of the Consolidated Municipal Act, 1883. as amended by 48 Vic. ch. 40, (O.) The second section of the by-law embodied the declaratory parts of sec. 1 of the amending Act, which enacts “that the word ‘hawkers,’ in sub-sec. 3 of sec. 495 of the Consolidated Municipal Act, 1883, shall include all persons who, being agents for persons not resident within the county, sell, or offer for sale, tea, dry goods, or jewelry, or carry and expose samples or patterns of any of such goods to be afterwards delivered within the county to any person not being a wholesale or retail dealer in such goods, wares, or merchandise.”

Defendant was adjudged to pay a fine of \$25 and \$1.45 costs, and in default of payment, and of sufficient distress, to be imprisoned for ten days.

A writ of *certiorari* was obtained to return the information, depositions, and conviction, and on the 1st June, 1886, *A. B. Aylelworth* obtained an order *nisi* to quash the conviction, with costs, upon the following grounds :

1. It is no offence that in any county any one, whether a resident within such county or not, should expose samples of cloth, and solicit orders for clothing, to be afterwards manufactured from such cloth, or from similar cloth, and to be then delivered to those who give such orders.

2. Neither the evidence nor the conviction discloses any offence.

3. The defendant was not, upon the evidence, a hawker, pedlar, or petty chapman, within the meaning of the Municipal Act.

4. The goods in which defendant dealt were not dry-goods within the meaning of the Act.

5. The defendant did not sell, or offer for sale, dry-goods, or carry and expose samples or patterns of any such goods, to be afterwards delivered within the county.

6. The conviction does not show that defendant carried or exposed goods to be afterwards delivered within the county to any particular person.

7. Neither the evidence nor the conviction shows that any person within the county, to whom such delivery was to be afterwards made, was not a wholesale or retail dealer in such goods.

8. No by-law of any municipality forbidding what was done by defendant was proved before the magistrate.

9. Nothing appears as to the date of the passing of the by-law, nor as to what the provisions of the by-law are.

10. The evidence shows, and the conviction does not negative, that the goods in question were the produce or manufacture of this Province.

11. The conviction does not allege that defendant was agent for any person not resident within the county.

12. There is no evidence supporting the averment of the conviction that defendant was not a householder or permanent resident of the County of Waterloo.

13. The conviction adjudges defendant to pay costs, but gives no direction as to whom they are to be paid.

14. Nothing appears from which it can be seen whether there was any legal authority in the magistrate to impose upon the defendant the sentence awarded by the conviction.

The evidence shewed that defendant had samples of cloths for suits, but not manufactured clothing: that he shewed these samples to several persons residing in Galt, and solicited orders for suits to be made from the same kind of material by his employer at London: that he had made sales of suits previously ordered: that he had no license, and offered no clothing for sale: that Mr. Wallace was not the manufacturer of the cloths of which defendant had the samples, and that the samples were both of imported and Canadian goods. The depositions also shewed that the by-law was "put in to be proved in the usual way," but they did not shew any actual proof of the by-law. It was alleged on the argument by counsel for the prosecutor that he was instructed that the by-law had been proved, and leave was given, subject to objection, to amend the return in that respect, if necessary. It also appeared that the defendant was the only party represented by counsel before the magistrate, and that the conviction was not drawn by any professional person.

June 11, 1886. *B. B. Osler*, Q. C., and *A. B. Aylesworth*, for the motion. It is contended that the carrying and exposing of these samples of cloths and soliciting orders for clothing to be afterwards manufactured from any of such cloths, and to be then delivered to those giving the orders, is not an offence within the Act as amended. There might, perhaps, be an offence if orders were taken for quantities of cloth similar to the samples and not manufactured in the Province, to be afterwards delivered within the county

to persons who were not wholesale or retail dealers in such goods; but the Act does not cover clothing to be manufactured from the cloths, of which samples are shewn for the purpose of getting orders for such clothing.

J. King (Berlin), for the prosecutor. The samples shewn were samples of "dry goods," and the clothing to be manufactured from the cloths similar to the samples would also be "dry goods." The cloths made into suits would not cease to be "dry goods," and the evidence shewed that sales of suits had been made. It also shewed that defendant exposed samples of imported cloths which are clearly within the Act. The other objections to the conviction are more or less technical, and the form of the conviction may be amended if the offence charged was substantially made out: 32-33 Vic. ch. 31, secs. 5, 12, 21, 22, 67, 68, 71 and 73. (D.) It was made out unless it is to be held that the clothing to be manufactured from the cloths in question would not be dry goods.

GALT, J.—This conviction involves the construction of the particular section of the Municipal Act referred to, in so far as it affects the conduct of this defendant. The argument has been pretty much confined to the meaning of that section, and as to whether the expression "dry goods" can be held to include clothing to be made from the cloths, samples of which defendant carried with him in order to effect sales of suits to be manufactured from these cloths. I do not think that what the defendant did brings him within the restraint of trade contemplated by the Act; nor do I think that such a restraint should be extended any further than the plain wording of the statute will admit of. Cloths are "dry goods," and if the defendant had sold, or offered for sale, imported cloths in bales or large quantities according to sample, and to persons not wholesale or retail dealers in such goods, he would probably have been liable to conviction under the by-law. He did nothing like that. He merely exposed samples of cloth, and solicited orders for

clothing to be afterwards manufactured from such cloth, and to be then delivered to the parties giving the orders. Without entering into the matter more fully, I think I must hold that that is not an offence within the statute, and that the clothing for which he solicited orders, after exposing his samples of the cloths from which it was to be manufactured, is not intended by the Act to be comprehended in the term "dry goods." I have less hesitancy in coming to this conclusion from the fact that my decision may be reviewed by the full court. The order will be absolute.

Conviction quashed, without costs.

(QUEEN'S BENCH DIVISION.)

REGINA V. MARSHALL.

Hawkers and pedlars—Con. Mun. Act, 1883, sec. 495, subsec. 3, as amended by 48 Vic. ch. 40 (O.)—Conviction under county by-law—Meaning of word "Agents" in amending Act.

Held, that, under 48 Vic. ch. 40, sec. 1 (O.), amending subsec. 3 of sec. 495 of the Consol. Mun. Act, 1883, a member of a firm carrying and exposing samples, or making sales of tea, &c., is not within the restriction preventing "agents for persons not resident within the county" from so doing, and is not such an agent.

THE defendant, Robert Marshall, a member of the firm of R. Marshall & Co., of the city of London, grocers, was convicted on the 25th March, 1886, before Robert Scott, Mayor of the town of Galt, for that the said Robert Marshall, not being a householder or permanent resident of the county of Waterloo, did, at the town of Galt within the said county, on the 24th and 25th days of February last past, carry and expose samples of tea for sale, to be afterwards delivered to parties within the said county, not being wholesale or retail dealers in such goods, without having first obtained the license therefor by law required.

The conviction was made under the county by-law referred to in *Regina v. Bassett*, ante, p. 51.

On the 4th of June, 1886, upon the return of the information, deposition and conviction under a writ of *certiorari*, *A. B. Aylesworth* obtained an order *nisi* to quash the conviction, on the ground that the defendant was not by the conviction charged to be, nor upon the evidence was he in fact, the agent for any other person not resident within the county; and also upon grounds similar to those numbered 2, 3, 6, 7, 13 and 14, in *Regina v. Bassett*, ante p. 51.

The evidence showed that defendant had taken orders for his firm for small quantities of tea from two parties in Galt on the days mentioned, that at the time no samples were carried or shewn, and that the tea was afterwards delivered to the purchasers for defendant's firm. Defendant swore that he sold his own tea, and that he took the orders on his own account, and was not acting for any other person in the sales. It appeared that neither party was represented by counsel before the magistrate, and that the conviction was not drawn by any professional person.

The motion was argued on the 11th of June, 1886, before Galt, J.

A. B. Aylesworth, for the motion. The conviction cannot be supported by the evidence, which shews that no samples of tea were carried or exposed by the defendant at the time of sale. The conviction does not aver that the parties to whom the sales were made, were not wholesale or retail dealers in such goods. It is no offence to sell to such dealers; and, for aught that appears, the purchasers were dealers in that way. If they were, defendant might be convicted a second time on this same charge. Defendant was the principal and not the agent, and a sale by him was not illegal under the by-law.

J. King (Berlin), for the prosecution. A member of a firm is an agent for the firm, and in this case defendant was the agent for his firm, who, it was admitted, carry

on business in London where the partners reside. Defendant, who was examined, does not pretend that the parties to whom he sold were wholesale or retail dealers. The plain inference is that they were not. The sole defence relied on was that defendant was a member of a firm, and not such an agent as firms usually employ; but the statute makes no such restriction, and the word "agents" should be taken in a wider acceptation. If no samples were exposed, it is clear there was a sale, and this was an offence under the by-law.

GALT, J.—I cannot concur in the view that a member of a firm carrying and disposing samples, or making sales himself, is an "agent" within the meaning of the Act. I do not think that a person in that position should be deemed such an agent. Defendant was convicted of carrying and exposing samples of tea for sale to be afterwards delivered. Of this there is no evidence. He may have made sales, but this would be a different offence under the by-law, and I do not think I can so amend the conviction as to make it cover an offence different from that stated therein. On the face of it the conviction is bad and should not stand. The order will be absolute, without costs.

Conviction quashed, without costs.

[QUEEN'S BENCH DIVISION.]

MATTHEWS V. THE HAMILTON POWDER COMPANY.

Negligence—Master and servant—Liability of defendant—Neglect of master.

Plaintiff sued as administratrix of her husband, who was killed by an explosion of defendants' powder mills at C., in Ontario, the head office of defendants being at M. in Quebec. The works at C. were carried on through a superintendent, who hired, paid, and discharged the workmen, saw that the works were kept in repair and generally managed and controlled the business, subject to instructions from the head office and to the directions of one W., a director of the company who lived at H., in Ontario, and occasionally visited the works. Some time before the explosion and while the works were idle, W. visited them. At that time the shaker, a machine used in the manufacture of powder in one of the buildings, was out of repair. This W. directed C. the superintendent, and D. a carpenter, employed on the premises, to have repaired before recommencing operations, which however, was not done, either through neglect on the superintendent's part, or in consequence of the company's having sent orders to be filled before it could be attended to.

Held, that though the superintendent's neglect was the neglect of a fellow workman, yet that W., a director, having given express directions to have the repairs made, C.'s neglect to repair the shaker was the neglect of the company, who were therefore liable.

ACTION by the plaintiff, as the widow and administratrix of George Matthews, on behalf of herself and the five children of the marriage, for the death of her husband, occasioned, as alleged, by the negligence and acts of the defendants, on the 9th of October, 1884, by reason of the defendants having a very large and excessive quantity of gunpowder in their building, known as the *Crackers*; and by reason of the defendants running their powder mills beyond their proper capacity for safety; and by reason of the defendants not having had a sufficient number of workmen employed in the said building, known as the *Crackers*, to operate the machinery therein; and by reason of the machinery in the said building, known as the *Crackers*, being at the said time out of repair, and in a defective and dangerous condition, all of which said facts were, or ought to have been, known by the defendants; and by reason of other negligence in the statement of claim alleged; and in consequence thereof the gunpowder

in the said building, known as the *Crackers*, became ignited and exploded, the force of which said explosion was greatly intensified by the excessive amount of gunpowder which was in the course of manufacture, or being stored in the said building at the said time, and by the shock or force generated by the said explosive fire was instantly communicated to the building known as the *Press*, and the gunpowder therein was ignited and exploded; and the said George Matthews, who was working therein, and who did not know of the said negligence of the defendants and the condition of the said premises, was killed, and within twelve calendar months before the commencement of this action.

The statement of claim also alleged that the powder mills of the defendants consisted of three distinct buildings, called the *Crackers*, the *Press*, and the *Glazer*, which were some distance apart from each other; and it was represented by the defendants to, and understood by, the deceased, and by the workmen employed in each of the said buildings that the same were so built apart for the purpose of safety; that in the event of an explosion by any means of the powder in any of the buildings, the powder contained in the others of them would not be ignited or exploded thereby; and it was further represented by the defendants to the said workmen at each of the said buildings, and to the deceased, that the quantity of powder that should at any time be kept in any of the said buildings would never be enough to generate sufficient force, in the event of an explosion, to carry fire to ignite the powder in the other buildings; so that each building was represented by the defendants to be, and was understood by the workmen employed therein to be, safe from any danger occasioned by any explosion from any cause that might occur at any of the other of the said buildings.

The defendants denied the allegations in the statement of claim alleged, and they pleaded that the buildings and works were properly built, laid out, and constructed, and all the machinery and appliances in connection therewith

were in good order and repair; and the business was properly managed and worked in every way at the time of the explosion, and the explosion was not caused by any neglect or default or mismanagement of the defendants. They further alleged that if the explosion was caused by negligence it was caused by said George Matthews, or of some of his fellow-workmen: that said Matthews was aware of the dangerous nature of the employment he was engaged in, and of the actual condition of the works and mode of managing and operating the same, in every particular, by the defendants and their workmen, before and at the time he entered into the employment of defendants, and he brought upon himself voluntarily all the risks incident to the employment.

Issue.

The action was tried at the last Fall Assizes at Hamilton, before Galt, J., and a jury, when a verdict was found for the plaintiff with \$2,000 damages, to be apportioned in the manner awarded by the jury to herself and her seven children.

The evidence was directed chiefly to the following points:

1. In which of the three buildings did the first explosion take place—in the *Crackers*, the *Press*, or the *Glazer*?

2. Was the shaker part of the machine in the *Crackers* out of repair at the time of the explosion, so that it was dangerous to work it?

3. Or was there a nut which had fallen off an iron rod used about that machine, which passed between the rollers of the machine, and created danger?

4. Did Corlett, the superintendent of the company at the mills in question, and a stockholder in the company, the company having it's chief place of business in Montreal, know of the shaker, [if out of repair] or of the nut being on the machine, [if it was on the machine] being worked, and suffer it to be worked in that state?

5. Was the state of the shaker or the nut passing through the machine the cause of the explosion?

In Michaelmas Term last *Edward Martin*, Q. C., for the defendants, obtained an order *nisi* calling upon the plaintiff to shew cause why the verdict and judgment obtained should not be set aside and a judgment entered for the defendants, or a new trial be granted on the following points: 1. For the misdirection of the learned judge, in charging that the defendants were liable, if the explosion occurred through the negligence or default of Edward Corbett, he being a competent person and a fellow-workman engaged in a common employment with the deceased.

2. For non-direction in refusing to charge the jury that the defendants were not liable if they had employed competent servants to operate their works, and furnished them with adequate materials and suitable means and resources, and were ignorant of any neglect on the part of their servants, or of want of repair; and for misdirection in charging that the defendants were liable, although they had employed competent servants, &c., [as in previous part relating to misdirection].

3. For non-direction in refusing to charge the jury that the deceased had knowingly entered upon a dangerous employment, and had thus taken upon him all the risks of such employment, including the negligence of his fellow-workmen.

4. That the verdict was against evidence and the weight of evidence.

5. And on the ground that the plaintiff should have been nonsuited, as there was no evidence on which the jury could properly find for the plaintiff.

In Hilary Term last *Robinson*, Q. C., and *Martin*, Q. C., supported the order *nisi*.

Fullerton and *Elliott* shewed cause.

The arguments and cases cited are referred to in the judgment.

June 29, 1886. WILSON, C. J.—I am of opinion, after going over the evidence carefully, that every one of the

questions was properly found for the plaintiff. But the question is, of what avail is that to the plaintiff if in law the defendants are not liable, and the cases shew that it is not sufficient that the superintendent of the defendants was guilty of negligence? It must be made to appear that the defendants did not use the greatest care in selecting a fit and competent person to manage the work for them, and if they did, the defendants are not liable.

The ruling of the learned Judge was in several respects objected to during the trial, and his charge, especially that part of it in which he directed the jury to find for the plaintiff if they found the superintendent of the defendants was guilty of negligence. The jury answered all the questions left to them adversely to the defendants.

There were many authorities cited to shew that although the defendants had appointed Corlett the general-manager or superintendent of their works in question, and he had the power to hire or dismiss the workmen, or to stop or go on with the works as occasion might require, to receive all complaints or notice of defects respecting the works, and had power to direct all repairs to be made, and although he did direct the men in the *Crackers* to go on with their work at the machine the rest of that day, notwithstanding the nut had not been found nor the machine repaired, and the accident happened before the reparation was made or the nut found, yet the defendants are not liable for the accident, because Corlett, to whom the company gave these powers, was found to have been, and to be, a competent and skilful person to manage and conduct such works, and the company supplied him with all necessary means and powers to manage and conduct them carefully and successfully; and as that is the rule and limit respecting the company's liability, the plaintiff has therefore no claim against the company, because they have not failed in the performance of their duty towards their employees; and because also Corlett, and Matthews, who was killed by the explosion, were fellow-workmen in the performance of a common employment; and the fact that

Corlett was in a much higher and more independent position than Matthews was, or that he was guilty of actual negligence, does not lessen the applicability of the rule that the master is not liable to his workmen for the acts of a fit and proper fellow-workman.

The cases bearing on the question are those which were cited on the argument. The case of *Wilson v. Merry*, in L. R. 1 Sc. App. H. L. 326, is very applicable.

In that case *Merry & Cunningham* were coal and iron masters, owning a coal pit in the county of Lanark. In opening a new seam of coal in the pit they erected a scaffold to drive the level, and it was completed before the son of the plaintiff went into the employ of the defendants in the pit. The platform interrupted the free circulation of air, and fire damp accumulated in the pit, and on the second day of the employment of the plaintiff's son in the pit, while he was searching on the scaffold with a light for a wedge, the light came in contact with the fire damp, an explosion took place and blew up the scaffold, and he was killed.

It was not suggested the defendants took any part in the erection of the platform, nor was any fault or negligence imputed to them. The general manager for the defendants in Lanark was Mr. Jack; the manager of the coal pit, under Mr. Jack, was Mr. Neish, and subordinate to Neish was Mr. Bryce, who attended to the underground operations. One Robson, formerly a mining engineer, was a partner of the defendants, and it was under the general direction of Robson and Jack that the working of this new seam was commenced. The charge of working the pit and making arrangements under ground for working it was given to Mr. Neish. It was proved at the trial, and not controverted, that Jack and Neish were competent persons for the work on which they were engaged; selected by the defendants with due care, and furnished by the defendants with all necessary resources and materials for working in the best manner.

The cause was tried, and under the direction of the pre-

siding judge the verdict was rendered for the plaintiff. On appeal to the Court of Sessions that finding was set aside and a new trial was ordered, and the plaintiff appealed to the House of Lords against that decision. The Lord Chancellor [Cairns] referred to the *Bartonshill Coal Co. v. Reid*, in 3 Macq. H. L. 282, and then proceeded: "I would only add to this statement of the law, that I do not think the liability or non-liability of the master to his workmen can depend upon the question whether the author of the accident is not or is in any technical sense the fellow-workman or *collaborateur* of the sufferer * *

The case of the fellow-workman appears to me to be an example of the rule and not the rule itself. The master is not and cannot be liable to his servant, unless there be negligence, on the part of the master, in that in which he, the master, has contracted or undertaken with the servant to do. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do; and if the persons so selected are guilty of negligence, that is not the negligence of the master; and if an accident occurs to a workman in consequence of the negligence of another workman, skillful and competent, who was formerly, but is no longer in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow-workmen. As was said in *Tarrant v. Webb*, 18 C. B. 797, negligence cannot exist if the master does his best to employ competent persons. He cannot warrant the competency of these persons." He also said: "The respondents had delegated no power, authority or duty to Neish, except in the sense in which a master, who employs a skilled workman to superintend a portion of his business, delegates power, authority and duty to the workman for that purpose. They left to him the arrangements

under ground, and the learned judge should not have told the jury that this could be viewed in no other light than as the ordinary employment by the respondents of a sub-manager or foreman. I think the learned judge should have told the jury that if they were of opinion the respondents exercised due care in selecting proper and competent persons for the work, and furnished them with suitable means and resources to accomplish the work, the respondents were not liable to the plaintiff for the consequences of the accident."

Lords Cranworth, Chelmsford, and Colonsay each gave a judgment, and they concurred in that statement of the law.

I have stated this case at large, for it saves the necessity of doing more than merely giving the names of the other cases which relate to that rule or proposition of law: *Allen v. New Gas Co.*, 1 Ex. D. 251, and the cases there cited; *Deverill v. The Grand Trunk R. W. Co.*, 25 U. C. R. 517; *O'Sullivan v. Victoria R. W. Co.*, 44 U. C. R. 128; *Wilson v. Hume*, 30 C. P. 542; *Waller v. South-Eastern R. W. Co.*, 2 H. & C. 102; *Howells v. Landore Siemen's Steel Co.*, L. R. 10 Q. B. 62. *Clarke v. Holmes*, 7 H. & N. 937, was a case of negligence of the master. There were other references and authorities cited, but so far as this case is concerned they are all the one way.

As to that part of the case which shews that Mr. Watson, who resides in Hamilton, and is a director of the company, and remits the money to Mr. Corlett to pay the men, was at the works in September, and that he, along with Mr. Corlett, gave directions to Dent, the carpenter, among other repairs to be made, to repair the shaker in the *Cracker* building, I refer to the different passages in Dent's evidence.

Mr. Watson, also, in his evidence said: "I am a member of the Powder Company, and one of the directors. Corlett has the sole management and control of the mills, subject to what direction I may give when I go out there, and from

the head office. I pay the men: we send the money out, and Corlett pays the men with it."

Does Mr. Watson's personal order to repair the shaker make any difference, the repair not having been made, but having been countermanded by Corlett?

I think it does. The shaker machine was out of repair. It was directed by Mr. Watson to be repaired. Mr. Corlett did not repair it, as he was directed by his employer. His neglect was the neglect of his employer, so far as others are concerned, and under these circumstances it appears to me the rule that a workman, who has been injured by the neglect of one of his fellow workmen, cannot maintain an action against their common employer for such neglect and injury, cannot be held to apply. The case therefore of *Wilson v. Merry*, before referred to, does not apply to the facts of this part of the case.

The decision in *Bower v. Peate*, L. R. 6 Q. B. 321, is that if a contractor be employed to do work, as to dig and remove the soil of his employer, which soil affords a support to his neighbour's property, the employer is liable, because the contractor was employed to do the particular work. And so, also, if the employer entrusts a contractor with the performance of a duty which the employer is bound to execute, and the contractor neglects to perform that duty, whereby an injury is occasioned, the employer is liable: *Ib.*, p. 328, quoting from *Pickard v. Smith*, 10 C. B. N. S. at p. 480; and see also *Ellis v. Sheffield Gas Consumers Co.*, 2 E. & B. 767; *Limpus v. London General Omnibus Co.*, 1 H. & C. 526; *Whatman v. Pearson*, L. R. 3 C. P. 422; *Reedie v. London and North Western R. W. Co.*, 4 Ex. 244; *Knight v. Fox*, 5 Ex. 721; *Whitely v. Pepper*, 2 Q. B. D. 276.

The knowledge of the defendants personally, through their co-partner Mr. Watson, of the bad condition of the shaker, and the necessity there was for the reparation that was ordered to be made of it, and the urgent, and I may say, the *immediate* necessity for such repair in a manufactory of that kind—a powder mill—where everything about

it, as every one knows, should be in the most perfect order, to guard against the proverbial danger there is of standing on a mine, which the employment in such a factory may be said to be, makes the defendants directly liable to their workmen for the injury they sustained by this terrible accident.

The evidence shewed, and the jury found, the shaker was in a dangerous state, from the want of repair, to continue to work it at the time of the accident, and also that Mr. Watson then knew of its condition.

The evidence shewed Mr. Watson gave orders to have the repairs made, and that Mr. Corlett did not obey these directions.

These last matters, although not found by the jury, are not questioned by the defendants. Upon the authority of the case of *Watkins v. Rymill*, 10 Q. B. D. 178, we may give judgment at once in the case.

The order *nisi* will, therefore, be dismissed, with costs.

ARMOUR and O'CONNOR, JJ., concurred.

Order nisi dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

THE WESTERN BANK OF CANADA v. GREEY ET AL.

Mortgagor and mortgagee—Trespass—Estoppel by acquiescence.

- B., the owner of a mill, subject to a first mortgage for \$4,000, held by one K., gave a second mortgage to plaintiffs. Subsequently B., being desirous of having the mill converted from the "Stone" to the "Roller" system, applied to M., manager of the Ontario Loan and Savings Co., for an advance of \$7,300, to enable him to pay off the mortgages and leave a surplus to be applied in part payment of the cost of reconstruction, which advance the company agreed to make, and a mortgage for that amount was duly executed by B. in favour of the company.
- B. thereupon entered into an agreement with defendants under which defendants were to reconstruct the mill for \$4,800, \$2,000 to be paid on completion of mill and balance in three equal annual payments, secured by a second mortgage on the property, and it was one of the terms of the said agreement that defendants should be furnished with a letter from M. agreeing to pay the \$2000 on completion of mill. Defendants, without communicating with M., commenced work and did not ask him for such letter until after the work had progressed for several weeks. When applied to for such letter, M. informed plaintiffs that he had not agreed with B. to give a letter for any specific sum, but only for whatever balance there might be left out of said sum of \$7,300, after paying off prior incumbrances, and that after allowing for the amount of such prior incumbrances there only remained about \$1,200, which latter amount he was willing to undertake to pay on the mill being completed. Defendants, in the course of reconstruction, had taken out most of the old machinery and put in new, and made considerable alterations, and upon M. declining to undertake to pay \$2,000, they removed the new machinery put in and left the mill in a dismantled condition. At the time defendants commenced work the amount due on plaintiffs' mortgage was about \$1,700. The mill, whilst in such dismantled state, was sold under power of sale in K.'s mortgage and only realized enough to satisfy it, and plaintiffs, contending that defendants by their acts had diminished the value of their security, and that B., the mortgagor, was insolvent, brought this action to recover damages to the extent to which their security was impaired. It appeared in evidence that M., besides being manager for the loan company, was also plaintiff's manager, and that he was aware that B. had made a contract with defendants for remodelling the mill, although he did not know the precise terms of such contract, and that he saw the work in progress and raised no objection.
- At the trial the learned Chief Justice dismissed the action, holding (following *Baker v. Mills*, 11 O. R. 253) that plaintiffs, second mortgagees, not having the legal estate, and not being in possession, or entitled to possession, could not maintain any action.
- Held, per* WILSON, C. J., and ARMOUR, J., that plaintiffs must fail, not on the ground upon which the learned Chief Justice at the trial dismissed their action, but upon the ground that they had by their conduct and acquiescence precluded themselves from bringing it.
- Per* O'CONNOR, J., that plaintiffs must fail on both grounds.

THE plaintiffs alleged that they were mortgagees of one Bickle by a mortgage, dated 13 September, 1884, upon

certain lands in the township of Whitby, on which was a flouring mill, fitted with the necessary machinery for such a mill, given to secure Bickle's indebtedness to the bank : that the mortgage itself shewed the amount of that debt to be \$7,285, or thereabouts, besides interest, and that the mortgage was given to secure the payment of that sum with interest, and also all other indebtedness which might arise or exist between the mortgagor and the mortgagee until the mortgage should be satisfied : that the mortgage was not to have the effect of extending the time for payment of any of the money secured by the mortgage, nor of releasing any security the bank held, nor of relieving any person from any liability for any of the said moneys : that there was a sum exceeding \$1,900 due on the mortgage : that after November, 1884, defendants broke and entered into the said lands and mill and dismantled the mill, and took and removed from the premises machinery and other things for operating the mill, and which were the property of plaintiffs, and thereby greatly depreciated the value of the mortgage security : that plaintiffs requested defendants to restore the mill as it was, but defendants refused to do so : that Bickle was unable to pay plaintiffs' claim, and their only security was said mortgaged property.

Defendants said that while Bickle was in possession of the said premises they, in November, 1884, made a contract with him to convert the mill which did the grinding with stones into what was called a mill doing its work by the roller system, and to do a great deal of other work, in connection with another, in otherwise improving the mill, for the sum of \$4,800, \$2,800 to be paid in three equal annual sums of \$933.33, for which Bickle was to give his promissory notes at 8 per cent, and the remaining sum of \$2,000 on completion and starting of the mill : that the notes were to be secured by a second mortgage, after one to the Ontario Loan and Savings' Company for \$7,000, the payments of which were not to commence until three years thereafter, at which time the payments under the second mortgage would expire ; and the \$2,000 to be

secured by a letter from McMillan [the cashier of the said bank, and also the secretary-treasurer of the said Ontario Loan and Savings' Company] agreeing to pay the said \$2,000 on starting the mill : that the work agreed to be done would have greatly increased the value of the mill premises ; and the plaintiffs knew of the contract so made with Bickle, and of the terms of it, and never objected to the sum, nor did they object to the defendants' commencing the work : that defendants removed part of the old works for the purpose of replacing the same with the new machinery : that Bickle failed to perform his part of the agreement, and also to procure the letter from McMillan, that the said Loan and Savings Company would postpone the payment of their mortgage for three years, and to pay the defendants said sum of \$2,000 on the completion of their contract ; and afterwards, thereupon, desisted from the work, and offered to plaintiffs to restore the mill as it had been upon plaintiffs' paying the discharge and lien thereupon for work done upon said contract.

The case was tried at the last Spring Assizes at Whitby, by Cameron, C. J., without a jury.

The evidence shewed that there were three mortgages upon this property.

1. A mortgage to D. S. Keith, dated before 1884, for a sum not mentioned.

2. A mortgage to the plaintiffs for \$7,285, of 13th September, 1884, above mentioned.

3. A mortgage to the Ontario Loan and Savings Company, dated 1st November, 1884, for \$7,300,

Keith sold the property, under his power of sale in the mortgage, in July, 1885. His debt at the time was \$4,563.62. The property was sold for \$4,700, and it required the whole of that sum to pay all off. The plaintiffs' claim was reduced at that time to \$1,718.10 ; and the Ontario Loan and Savings Company's mortgage for \$7,300 covered the amount of Keith's mortgage, and the amount due on the plaintiff's mortgage at that time was about \$1,500. The balance between these two sums added

together, and the \$7,300, was to be paid to Bickle, that is, it was to be paid to the defendants. It might have been \$2,000 more or less, but McMillan said he never agreed to pay any specific sum. He said: "I say positively there was no agreement that we were to advance this money. We were to pay to Bickle, or to his order, whatever might be in our hands. * * I said to Mr. Gamble [who came for \$2,000] I could not give him a letter for \$2,000, when we had only about \$1,200 in our hands: that we were quite willing to give him a letter for that amount. * * Mr. Gamble seemed annoyed, * * and being anxious to help Bickle out of the matter, I said, 'Well, Mr. Gamble, I think the Loan Company will do this. They will increase their mortgage by \$800, and make it \$8,100 in order to enable Mr. Bickle to carry out his contract with you.' Mr. Gamble replied that he could not do anything without consulting his firm. I think he remarked that would set back his own mortgage; they were to take a second mortgage after the Loan Company. He went away."

He also said: "Mr. Gamble stated his commission was to get \$2,000 security for his firm, and failing to get that his firm would have to quit work."

In cross-examination he said: "Going upon Mr Bickle's knowledge and representation we finally consented to have the mill remodelled." Bickle's application to the Loan and Savings Company was for a loan to remodel his mill.

The loan was passed and his mortgage taken for that purpose.

"We were consenting parties to the remodelling of the mill, so far as the Loan and Savings Company were concerned—so far as the bank was concerned; I knew it as cashier of the bank. I saw the work in progress and did not object. I knew the balance in our hands was where the cash payment was to come from."

Q. It turns out Keith has \$4,700 and you have \$1,700 ?

A. We had in our hands about \$1,200 after paying off incumbrances.

Q. Although you got the mortgage for \$7,300 you never

attempted to pay the Keith mortgage off? A. We wish for a settlement.

Q. You knew how much you had to pay and you never paid it? A. No.

Q. And you let the property be sold under the mortgage, although you had the money in your hand which you were bound to pay it off with. A. In writing—that the property was destroyed. * *

Q. It seems to me Henry Bickle has got in your hands \$7,300? A. Yes.

Q. Why didn't you carry out the loan? A. Because we were wanting to get the mill completed. Before any money would be advanced we were to have a clear title, and the mill was to be completed and in perfect running order. I wrote a letter to Mr Bickle before any money was to be advanced.

Q. You were to have a roller mill? A. The mill was to be a roller mill made perfect.

Q. Made perfect as a roller mill before any money was to be advanced? A. Yes.

Q. Upon thus being made perfect as a roller mill the bank would be paid? A. Then the loan company would distribute the money, would pay off the Keith mortgage and the bank mortgage, and the balance would go to Mr. Bickle or his order.

Q. What you are complaining of here now is that Mr. Bickle did not carry out his agreement, and turn it into a roller mill? A. I suppose so.

Q. Whom did you look to to complete that as a roller mill? A. Mr. Bickle would have to be a party to it decidedly. We left it expecting the work would be completed on a roller system, or no money would be paid over.

Q. And now the bank is suing Messrs. Greey because Mr. Bickle did not carry out his arrangements to make a roller mill for you? A. The bank is suing Greey for destroying our property. If Greey never touched the mill it would have made no difference to the bank. The bank was amply secured without the roller process by the mortgage it had."

The letter of the 8th October, 1884, from Mr. McMillan to Mr. Bickle, as cashier of the bank, referred to the Loan and Savings Company being willing, as he thought, to advance him \$7,000, which would leave him \$1,500 to apply on the improvements in the mill after providing for Keith's mortgage and the bank mortgage.

"You would then have but one mortgage to deal with instead of three or four. I presume you could arrange with Mr. Keith to accept his money; if not, the company would so arrange their mortgage as to pay off Keith's when due? You would then be in a much better shape with your bank when prepared to recommend your milling. We would be straining a point to help you as suggested. P. S.—No portion of the money would be paid until the work was duly completed and accepted."

Mr. McMillan, for the Loan Company, on the 24th October wrote to Bickle: "If you intend to go on with the change, you must see Mr. Keith whether he is willing to accept his money and discharge your mortgage; if not, we must find out his actual claim, and arrange it otherwise."

In his letter of the 10th of December, 1884, Mr. McMillan, for the Loan and Saving's Company, wrote to Mr. Bickle that the Keiths "ask a bonus to accept their money but do not state what amount. However, it will not matter, as the money can be held until the mortgage matures, but you must arrange as agreed to provide for the interest at once, \$335. * * We have not as yet received back the mortgage from Greey; on receipt of it we will send them the letter of credit as agreed."

The learned Chief Justice dismissed the action, with costs.

June 4, 1886. *Ritchie*, Q. C., moved to set aside the judgment and enter it for the plaintiffs; or for a new trial, on the law and evidence.

Moss, Q. C., and *Ritchie*, Q. C., supported the motion.

Osler, Q. C., and *H. D. Gamble*, contra.

June 29, 1886. WILSON, C. J.—I cannot distinguish between what Mr. McMillan, the cashier of the plaintiffs' bank, knew as cashier from what he knew as secretary-treasurer of the Loan and Saving's Company. Both businesses were managed by him, and were carried on in the same office.

When Mr. McMillan, on the 8th of October, wrote Mr. Bickle, who had asked the bank to make him a further advance, to enable him to remodel his mill, and said the company would, he thought, advance \$7,000, and pay off the mortgages of Keith and the bank, he was writing, I think, certainly for the bank, and, as I think, for the Loan Company as well. The letter is headed: "Office of the Western Bank of Canada," and it begins, "*Re* your coll'l mtge.—Referring to our conversation on Monday last regarding the position of the collateral mortgages held by this bank against you, and the further advance you desire the bank to make, &c." There is no doubt Mr. McMillan knew, as cashier of the bank, the changes that were to be made in the mill: he admits that he saw the work going on, and he did not object. He makes the distinction between what the Loan Company consented to and what the bank knew and did not object to. He could not possibly have denied that the Loan Company had expressly consented to the change after having taken the mortgage and written all that he had written about it. When he said, in his evidence, that what was now complained of was that Bickle did not turn the mill into a roller mill, I understand him to be speaking as the cashier of the bank, for the Loan Company had nothing to complain of whether Bickle ever turned his mill into a roller mill or not, as that company had never paid one farthing for him, and had no claim whatever upon him or upon their mortgage. He afterwards said, however, that if Greey had never touched the mill it would have made no difference to the bank, as the bank was amply secured by the mortgage upon the mill, and that the bank was not complaining of the mill not having been made into a roller mill, but of the mill having been destroyed.

I infer the bank had not only positive knowledge of the proposed change in the mill, but knew of the change being made in the mill and assented to it, and knew also of the terms upon which the work was to be done and upon which it was being done ; and that the bank claim was to be paid off by the Loan Company under the mortgage which had been taken for that and for other purposes, and that the bank assented to all that. Then what was the real cause of the difficulty ? It was certainly not anything that the defendants did, because what they did was for the improvement of the mill and the increase of the plaintiffs' security, and it was done for their benefit and with their consent.

The cause of the difficulty was, that the Loan and Savings Company did not, as they engaged and were bound to do, pay off the Keith mortgage and preserve the mill from being sold, so that it could have received the new machinery and improvements which had been bargained for.

In the plaintiffs' letter of the 8th October the postscript is : " No portion of the money would be paid until the work was fully completed and accepted." That money is confined only to the surplus which would be in the Loan Company's care after providing for the two prior mortgages ; it does not refer to the money payable under the Keith mortgage, for in the same letter it is said : " I presume you (Bickle) could arrange with Mr. Keith to accept his money ; if not the company would so arrange their mortgage as to pay off Keith's when due."

Then in the Loan Company's letter, of the 24th October, to Bickle, it is said : " You have been too hasty in promising the Messrs. Grey payment in advance of the completion of the work, for most certainly we will not advance any money until the work is completed and accepted. We will, as a matter of security to the Greys, give them a letter of guarantee to pay them over the money when the work is complete." And, again : " It is alike in your own as well as our interest that no money be advanced until

the work is completed and accepted." All that plainly refers to the money the company was to pay to the Greeys, it had nothing to do with Keith's mortgage money; for in the same letter it is said, "You must see Mr. Keith whether he is willing to accept his money; and discharge your mortgage; if not, we must find out his actual claim and arrange it otherwise." And whatever Mr. McMillan may have said in his evidence, must be qualified in the like manner.

If the Loan Company had paid off that mortgage and saved the mill from being sold, and that they were bound to do by their agreement with and mortgage from Bickle, the plaintiffs would have had the full security for their money; and if the plaintiffs have not a claim upon the Loan and Saving's Company for the loss they have sustained by the sale of the mortgaged property, Bickle, I should say, certainly had for the loss which he has suffered.

I am quite willing to treat the action as brought for the acts of the defendants having been done in depreciation of the property of which the plaintiffs were second mortgagees, while the mortgagor was in the actual possession of the premises, and to strike out any part of the present statement of claim which may be held to constitute the action, one for trespass, if that be a difficulty in the way. But then the action is met by the express leave and license of the plaintiff to all that was done to the property by the defendants; and I am disposed to think that, as they and the Loan Company were so identified in this transaction, they are bound by everything which that company did.

As to plaintiffs being disqualified to sue in trespass while they as mortgagees are not in possession, but another, the mortgagor, being in possession, the cases are: *Litchfield v. Ready*, 5 Ex. 939; *Baker v. Mills*, 11 O. R. 253; *Barnett v. Guildford*, 11 Ex. 19, explaining and in part overruling *Litchfield v. Ready*, *supra*; *Harrison v. Blackburn*, 17 C. B. N. S. 678; *Turner v. Cameron's Coalbrook Steam Coal Co.*, 5 Ex. 932.

These cases shew a mortgagee not in possession, or a landlord after the end of the lease, or heir or lessee, or assignee of lessee, cannot maintain trespass before entry.

The *Semble* in *Mann v. English*, 38 U. C. R. 240, that the mortgagee not in possession before entry may maintain *trespass*, is not sustainable.

I see no reason why the same law does not continue, since the Judicature Act, as was decided in *Baker v. Mills*, 11 O. R. 253, and in some of the cases there referred to.

There may be much to be said upon this point; but as the High Court now possesses, in its different divisions, the jurisdiction which formerly was vested in the Court of Chancery only, and as that court granted injunctions to stay trespass, at the instance of persons not in possession, until the title for the trespass could be tried at law, it may be that the court may now, having jurisdiction to entertain the claim to stay trespass, may retain the action, and try the whole matter between the real and substantial parties, without regard to the objection that the real party is not in possession by virtue of a formal entry.

It is not necessary to consider that point in this case, nor do I lay much stress upon it; for the substance of the action is for the depreciation of the value of the property, to the prejudice of the plaintiff, by the wrongful acts complained of, and the pleadings, if thought to be in the formal frame of an action of trespass, may be amended, if necessary, to make the action, as it is in substance, an action for the depreciation caused by the defendants to the value of the property.

For the reasons before given, I am of opinion, as the whole facts are before us, and we are competent to give a final judgment, that we ought to amend the pleadings in the manner just mentioned, if the plaintiffs desire it, and that judgment be then entered for the defendants upon the merits; and if the plaintiffs do not amend their statement of claim, that judgment be then given for the defendants, upon the ground that the plaintiffs cannot maintain the possessory action of

trespass, not having been in possession any time before action brought ; and also upon the merits, if the action can be read as one not in trespass, but for the acts alleged to have been done to the injury of the value of the property by the defendants for the reasons assigned ; and that the entry of judgment by the learned Chief Justice be amended so as to agree with the judgment now given, and that the motion be dismissed with costs.

ARMOUR, J.—I think the plaintiffs must fail, not on the ground upon which the learned Chief Justice of the Common Pleas dismissed their action, but upon the ground that they had, by their conduct, precluded themselves from bringing it.

O'CONNOR, J.—This is essentially what was formerly called an action of trespass.

It appears that, although McMillan had taken from Bickle a mortgage for \$7,200, for the express purpose of paying off the Keith and bank prior mortgages, and of applying the balance, at least \$1,500, towards the expense of remodelling the mill, he refused to pay \$500 at the commencement of the work, or any sum until the completion of it. It is evident that this was not what Bickle understood or expected.

Two facts are clear, then, from the evidence ; namely, (1) that McMillan was the manager and agent of the bank, as well as of the Loan Company, and that as such he was looking after and taking care of the interests of both these institutions, which, though nominally distinct, were for the most part identified in interest and conducted with a view to mutual benefit and accommodation ; (2) that the plaintiffs, the bank, had, through their cashier, manager, and agent, distinct and ample notice of the contract between Bickle and the Greeys for the remodelling of the mill ; and if they were not consenting, as I think they were, they were not objecting parties thereto, and the dismantling which they complain of in this action was done

after notice, under their eyes, not only without objection, but with the assent and active co-operation of their agent.

At the time of the sale in June, 1885, there was due on the Keith mortgage \$4,563.62; the amount due and secured on the bank's mortgage, was \$1,718.10, more than four times the amount secured by the mortgage on its face. The two sums together amounted to \$6,281.72. McMillan valued the mill and property, as the mill was before the old machinery was disturbed, at \$8,000; the old machinery, says one witness, a millwright who worked at remodelling the mill, could be restored and the mill put in its former working order for \$200; one of the witnesses for the plaintiffs, a skilled hand and mill owner, says for \$1,000. The Greys, if secured, would have completed the remodelling, as they did after the sale, and so greatly enhanced the value of the mill; yet the plaintiffs permitted the mill to be sold under the Keith mortgage at a great sacrifice, no doubt.

With three apparent registered mortgages on the property, and the dispute with and claim of lien by the Greys, intending purchasers would keep aloof. It is, therefore, likely that the conduct of the plaintiffs' agent contributed as much as, if not, indeed, more than, the action of the defendants to the sacrifice of the property.

It is rather evident, I think, that McMillan was throughout these mortgage transactions on behalf of the two institutions, which he managed and conveniently represented, acting a shrewd part, but he seems to have overshot the mark.

But, however that may be, I have no hesitation in saying that, in my opinion, the plaintiffs cannot under the circumstances of this case maintain this action. In the first place, they never had the legal estate, or any right or title thereto, nor had they possession or a right to the possession, and therefore they cannot maintain trespass, nor can they recover in any other form of action. The recent case of *Baker et al. v. Mills*, 11 O. R. 253, is in point

and directly against the plaintiffs to the full extent that I have just stated. The judgment at pp. 261, 262 and 263 is quite explicit. The case of *Higginbottom v. Hawkins*, L. R. 7 Ch. 676, there cited, is also a clear authority against the plaintiffs' right to recover, in law or in equity, in trespass or any other form or species of action.

But if the difficulty just referred to were not in the way of the plaintiffs, barring them from recovering, I should feel constrained to hold that their right to recover, if it ever existed, was barred by their laches, their conduct, acquiescence, the acts of their manager and agent.

Altogether I have not the slightest doubt that the learned Chief Justice, who tried this action, properly dismissed it with costs, and this motion should also be dismissed, with costs.

Motion dismissed, with costs.

[CHANCERY DIVISION.]

COOK v. NOBLE.

Will—Devise—Legacy—Maintenance to widow and family—Abatement of legacies.

A testator gave to his executors and trustees, of whom his wife was one, all his real and personal estate, with a direction to convert his personal estate into money, pay debts, and invest the balance. He directed them to pay his wife from time to time such money as might be sufficient to support, maintain, and educate his family, and to maintain his wife in a manner suited to their condition in life, and for that purpose gave his wife power to collect money and to take therefrom enough to maintain his family and herself. And he directed his sons to pay her \$150 a year after they received their lands, charging it on his lands, but they were not to pay it so long as she and the family were maintained out of the estate. The trustees were to pay \$1,000 to each of the daughters as they attained twenty-one, and if there was not sufficient personal estate to pay them, the balance was to be a charge on the real estate: the real estate was to be divided between the sons when the eldest attained twenty-five, and then the trustees were to give him \$2,000. The balance of the personal estate was to be divided between the sons, the eldest being charged with his \$2,000. The testator's widow married again.

Held, that the children were only entitled to maintenance until they attained their majorities.

Held, also, that the widow was entitled to maintenance until the provision as to the \$150 came into operation which would be when the sons respectively attained twenty-five. Although the maintenance was to be made from the personal estate, and no part of the rents were assigned for that purpose, as the devisees of the real estate were not entitled until they attained twenty-five, the intermediate rents not being disposed of descended to the heirs-at-law, *i. e.*, the children, and might be applied for their maintenance if the personal estate was insufficient.

When a testator has himself specified the time for the duration of maintenance, that will be observed; but the right to maintenance and support, when given in general terms, will cease with the marriage or forisfiliation of a child. *Knapp v. Noyes*, Amb. 662; *Gardner v. Barber*, 18 Jur. 508; and *Wilkins v. Jodrell*, 13 Ch. D. 564, considered and commented on.

A widow ceases to be entitled to support and maintenance upon marrying again.

Quere as to her rights if she should again become a widow without means of support.

The personal estate turned out insufficient to pay the legacies of which the one of \$2,000 was first payable out of those remaining unpaid.

Held, if the \$2,000 legacy to the son absorbed all the personal estate the daughters would get none of it as their legacies were charged on the land, and that the \$2,000 legacy and the legacy for maintenance must abate proportionally, and that there was no ground for marshalling.

THIS action reported 5 O. R. 43, came on for hearing on further directions, and for a further construction of the

will (a) of the testator John Cook, on February 3rd, 1886,

Moss, Q. C., and *McPhillips*, for the plaintiffs. This is an action brought by the widow and infant daughter of John J. Cook, the eldest son of John Cook, the testator, against the executors and trustees under his will, and the surviving infant children of the said John Cook. The will was made on November 8th, 1872, and the testator died November 22nd, 1882, leaving a widow and six children, four of them being daughters and two sons. One daughter died before attaining the age of twenty-one years without issue, so that her legacy of \$1,000 became under the will subject to be divided between the two sons. John J. Cook died in the year 1882, before attaining the age of twenty-five years, leaving the plaintiffs his only child and widow respectively, and having made a will devising all his personal property to his wife, but intestate as to his real estate. The judgment herein declared that the widow was, under her husband's will, entitled to her husband's legacy of \$2,000, under his father's will, and the other plaintiff was entitled, as heiress at law of her father, of the land coming to him under the said will, subject to her mother's dower. The Master reported, and finds as follows :

Personal estate come to the hands of the

executors and executrix	\$12,052 74
Properly paid and allowed	11,478 29

Balance due from them.....	\$574 44
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No creditors.

Schedule of legacies amounting to	\$5,527 58
Outstanding personal estate	1,428 50
Sale of part of the real estate	1,376 00

The personalty is therefore insufficient to pay the plaintiff, Sarah Jane Cook, \$1,690.08, being the unpaid balance, as found by the Master, of the \$2,000 legacy, and as the personal estate is the only fund to which she can

(a) The will is set out in full in note to judgment, at p. 87.

resort for it, the real estate must be marshalled so as to put her in the same position as to it. The trustees paid John J. Cook in his lifetime \$650, as the amount due him for his half of the legacy to his deceased sister, and took it out of the personalty to do so. This was charged on the realty by the will, and only one half of it should be charged to John J.'s share of the real estate, and the other half to William's (the other son) share, and John J. should not suffer for the trustees' acts. (*Cassels*, Q. C., who appeared for the adult defendants. But William is also entitled to half of the sisters' legacy too, and he can charge half back against John J. on the same principle.) No, it is not the same person who is claiming the legacy and the charge. [PROUDFOOT, J.—But John J. agreed to take the half in his lifetime.] But there is nothing to show he knew it was being paid out of the personalty, and he should not suffer for the acts of the trustees. The infant plaintiff is entitled to half the proceeds of the realty sold, half of the rents of the remainder until sold, and half of the *corpus* of the remainder unsold.

MacLennan, Q. C., for the infant defendants. One of the principal questions in which the infant defendants are interested, viz., the maintenance, has not yet been disposed of and has not been dealt with by the Master. The will gives to these executors, of whom the widow is one, all the real and personal estate. There is a maintenance to the widow and children during the natural lives of the children, or the widow at least. [PROUDFOOT, J.—You would require very strong language for the natural lives of the children.] The will gives all the estate to the executors upon trusts, and directs them to collect moneys, pay debts, and invest as to them seems best. The estate was in a very available position, and the direction to the executors was to pay such sums "as may be sufficient to support, maintain, and educate my family, and to support and maintain my said wife." [PROUDFOOT, J.—That is a charge on the whole estate, both real and personal,

and John J.'s legacy is only charged on the personal estate. If there is enough realty to pay the maintenance, should John J.'s legacy be prejudiced?] The maintenance is the first charge on the whole estate, and the widow has full power under the will to collect and get in money for the maintenance. Then the will provides for the payment of \$150 by the sons to the widow *during life*, and that is charged on the lands, but is not to be paid while the widow and family are supported out of the estate. The maintenance is charged on both the real and personal estate. The \$150 provision is in lieu of dower. Then the legacies are provided for the daughters.

It may be argued that as they get their legacies at twenty-one, their maintenance is then to cease, but nothing of that kind is said in the will where the maintenance is given without restriction. A gift of maintenance continues as long as there is any necessity, and that is during natural life. The real estate was to be divided in specie when John, the eldest son arrived at the age of twenty-five years, and then \$2,000 was to be given to him to stock his share. That \$2,000 comes out of the personalty, and is not to come out of the realty in aid of the personalty. The widow is an object of the maintenance, and as there was no restriction on it, it must be for her life. The money to be paid to her was for the maintenance of herself and the family. Maintenance is for the benefit of an individual. If all the children died, the widow could elect and say whether she would take the \$150 provision or maintenance. As to the duration of maintenance, see *Wilkins v. Jodrell*, 13 Ch. D. 564. A nephew was held entitled during life in *Soames v. Martin*, 10 Sim. 287. Maintenance, education, and *bringing up*, was held to end at twenty-one, in *Badham v. Mee*, 1 Rus. & My. 631. See also *Kilvington v. Grey*, 10 Sim., at p. 296, future comprehends all time maintenance to continue during life.

The case of *Gardner v. Barber*, 18 Jur. 508, was dissented from in *Wilkins v. Jodrell*, *supra*, and *Soames*:

v. *Martin*, *supra*, was followed in preference. There is a difference between "maintenance" and "support." When the words "maintenance and education" are used, it ceases at twenty-one under the old cases *Foley v. Parry*, 2 My. & K. 138: *Bowden v. Laing*, 14 Sim. 113: *Theobald*, 2nd ed. 396. Maintenance was given after the death: *Lewes v. Lewes*, 16 Sim. 266. Maintenance is intended for the benefit of the grantee. This is a clear gift of maintenance to the widow and family, and no time is mentioned at which it is to cease, and it must continue for the life of the widow at least, and she is to receive the income. A child may have a legacy and maintenance as well, so the legacies in this case make no difference in the maintenance. No part of the *corpus* of the estate can be paid to the widow plaintiff, as it is the security for the maintenance. [PROUDFOOT, J.—Do you make no difference between the sons and the daughters?] No. [PROUDFOOT, J.—Does it seem reasonable that the sons should have the real estate divided among them, and share maintenance as well?] The land would only be conveyed subject to the maintenance and legacies which are charged on both the real and personal estate. This is not a case for marshalling. The legacies to the daughters are not charged on the realty unless the personalty is insufficient. [PROUDFOOT, J.—Yes, but they have the security of both funds.] No, they cannot resort to both funds as a matter of right. If the personal estate is sufficient they are confined to it, and it is only for the deficiency they can go to the real estate. The rule as to marshalling, only applies where the creditor has a right to resort to both funds, which is only had here in the event of the personalty proving insufficient. John J., during his lifetime, got his half of the legacy of the daughter who died, and William is entitled to his half absolutely, although his own share under the will might go over in case of his death, and he should be put upon the same footing as John J. with respect to that half legacy. The money paid into Court cannot be paid out, as it is security for the maintenance. I refer to *Simpson's Law of Infants*, 289.

Cassels, Q. C., and *Holland* for the adult defendants, the executors and executrix (widow of John Cook). All the points now raised here were not decided on the motion for decree, but it was there decided that there should be marshalling. The maintenance for the widow and family is charged on the real and personal estate until the youngest child attains twenty-one, when the widow gets the \$150 annuity from the sons. The last clause of the will shews that the testator only intended the legacies to be paid out of the residuary personal estate. The whole personal estate, and at least the rents of the real estate, are chargeable with the maintenance until the youngest child attains twenty-one. Perhaps each child would drop out as they attained twenty-one. The widow is entitled to her support and that of her family, and then the sons were to pay her the \$150, but not while she was getting the maintenance, showing that she was to get it after they had the lands and that it was a charge on the land, although no payment was to be made while she had the maintenance. The executors are not bound to pay back the amount found due by them, because it has gone for maintenance, and the personalty is chargeable with the maintenance. I refer to *Barclay v. Zavitz*, 8 O. R. 663.

Moss, Q. C., in reply. None of the cases cited go beyond this, that the intent of the testator is to be observed, and they are no aid to this case. Here the testator thought there was sufficient personal estate. [PROUD-FOOT, J.—But he provides for a deficiency.] Yes, as a matter of precaution only. The will does not entitle the widow to resort for the maintenance to the *corpus* of the estate, although she might be entitled to the income of the personalty and the rents of the realty. If the maintenance was for the lives of the parties, the effect would be to strike the \$2,000 legacy to the eldest son out of the will, and the half of the real estate could not be handed over to him when he attained twenty-five. If the *corpus* had to remain a security for the maintenance, then John J. could not have got his \$2,000 when he attained twenty-five:—

Gibson v. Annis, 11 Gr. 481; *Perry v. Walker*, 12 Gr. 370. If the maintenance was for the life of the wife her interest would be a life estate, but *Gilchrist v. Ramsay*, 27 U. C. R. 500, shows that that is not the effect of such a devise. Even where there is a general charge for maintenance, the marriage of a daughter would put an end to it: *Bowden v. Laing*, 14 Sim. 113; *Carr v. Living*, 28 Beav. 644. The widow has married in this case, and, under the language used in *Carr v. Living supra*, she must lose the maintenance.

April 16th, 1886. PROUDFOOT J.—Hearing on further directions. The will of John Cook came before me for construction, and my decision is reported in 5 O. R. 43. At that time only two questions were disposed of, viz: That the infant plaintiff was entitled to the land devised to her father by the testator, and that the widow of the devisee, the other plaintiff, was entitled to the legacy of \$2,000 bequeathed to her husband. A statement was also made as to marshalling, which was a correct enough statement of the general rule applicable to the state of facts mentioned in the judgment, where the personal estate is not sufficient to pay the legacies, some of which are charged on real estate and others not, but which may require reconsideration upon the facts varying that assumed state of facts, and of the further argument to which they have been subjected.

For the decision of some of the questions now argued it is necessary to refer to several of the provisions made in it, and therefore the whole will is subjoined. (a).

(a) In the name of God, Amen. I, John Cook, of the township of Hamilton, in the county of Northumberland, yeoman, declare this to be my last will and testament, hereby revoking any will by me at any time heretofore made. I give and bequeath to William Noble, of the township of Haldimand, in the county of Northumberland, yeoman, Michael Davidson of the township of Hamilton, in said county, yeoman, and my wife Sarah Maria Cook, all my estate both real and personal upon the following trusts, and appoint them the executors and executrix respectively, of this my last will and testament. I direct my said trustees as

For the younger children of the testator it was argued that maintenance was given to the children for life, and also to the widow of the testator for life, and that there could be no marshalling in favor of the legacy to which the plaintiff, the widow of the devisee, is entitled.

Before proceeding to discuss the several provisions in the will that may affect the time for which maintenance is to be given, I propose to consider the cases cited to me on the general question, to what time maintenance is to be allowed when there is no express limitation of time in the will.

The texts of the civil law in regard to legacies of aliment have considerable resemblance to our law, and *aliment* is, I think, equivalent to our *maintenance*, as it comprehends food, clothing, and a place of abode, for without these the body cannot be supported, but education is not comprised in it, unless the testator has so expressed himself. *Dig.* xxxiv 1, ll. 6, 7, *Legatis alimentis cibaria, et vestitus, et habitatio debebitur, quia sine his ali corpus non potest; cætera, quæ ad disciplinam pertinent, legato non conti-*

soon after my decease as may be convenient, to convert all my personal property into ready money, and collect all my accounts, and pay my debts and funeral and testamentary expenses, and invest the balance in bank stock or on mortgage securities, as to my trustees shall seem best. I direct my said trustees to pay to my said wife Sarah Maria Cook from time to time, such sum and sums of money as may be sufficient to support maintain and educate my family, and to support and maintain my said wife in a manner suited to their condition in life and for that purpose I give my said wife Sarah Maria Cook power to collect money and to take therefrom sufficient to maintain my family and herself in the manner aforesaid, and to render an account thereof from time to time, to my said other trustees, and that my sons shall pay to my said wife Sarah Maria Cook annually, the sum of one hundred and fifty dollars during her life, after they receive the hereinafter mentioned lands, which said sum is made a charge upon the said lands, but my said sons shall not be called upon to pay to my said wife Sarah Maria Cook, the said sum of \$150, so long as my said wife and family are supported and maintained as aforesaid out of my said estate, and the said sum of one hundred and fifty dollars per annum, shall be in lieu of any dower to which my said wife may be entitled out of my said estate.

I direct my said trustees to pay to each of my daughters the sum of one thousand dollars when they shall attain the age of twenty-one years respectively, and in case there should not be sufficient

nentur; nisi aliud testatorem sensisse probetur. And a legacy of this kind was for life, unless the testator limited another time for its continuance. *Dig. eod tit, l. 14 pr* : Mela ait, si puero vel puellæ alimenta relinquantur, usque ad pubertatem deberi. Sed hoc verum non est, tandiu enim debebuntur, donec testator voluit, aut si non paret, quid sentiat, per totum tempus vitæ debebuntur. And a legacy *ut quendam educes*, equivalent to *bringing up*, is declared by Paul, *l. 23 eod tit*, to be equivalent to a legacy of *aliment*. Rogatus es, ut quendam educes; ad victum necessaria ei præstare cogendus es. Paulus : cur plenius est alimentorum legatum, ubi dictum est, et vestiarium, et habitationem contineri ? Imo ambo exæquanda sunt.

In one general principle the civil law coincides with ours, that the wish of the testator is to govern, when it can be ascertained, but I think I shall show that it differs from ours in the disposition it makes when the testator has not expressed his wish.

personal estate to pay the same, then the balance so remaining unpaid shall be a charge upon my real estate. I direct my said trustees to divide my real estate equally, due regard being had as to the value of the same, and the improvements thereon, between my sons then living, when my eldest son shall attain the age of twenty-five years, when the share coming to my eldest son is to conveyed to him by my trustees, and my trustees are to give to my said eldest son the sum of two thousand dollars to stock the same, and that my said trustees shall convey to my other sons their respective shares of real estate, as they shall respectively attain the age of twenty-five years. I direct that the balance of my personal estate, after paying my said daughters their one thousand dollars each, and the \$2,000 to my eldest son is to be divided equally amongst my said sons then living, share and share alike; but the \$2,000 paid to my said eldest son, shall be considered a part of his share in the residue. In case any of my said sons shall die before attaining the age of twenty-five years and without issue, or any of my said daughters before attaining the age of twenty-one years and without issue, then the shares of the parties so dying as aforesaid shall be equally divided amongst my son or sons then living, share and share alike, and if there should be no son or sons then living, then that the same be equally divided amongst my daughter or daughters then living, share and share alike.

In witness whereof, I have hereunto set my hand and seal, this eighth day of November, in the year of our Lord one thousand eight hundred and seventy-two.

The counsel for the defendant claiming maintenance placed great reliance on *Wilkins v. Jodrell*, 13 Ch. D. 564, which seems to be the latest case on the subject, in which Hall, V. C. held that a provision for maintenance and education was not limited to minority, and extended to the whole life of the legatee.

In coming to this conclusion he was at variance with the case of *Knapp v. Noyes*, Amb. 662, and with *Gardner v. Barber*, 18 Jur. 508, the former decided by Lord Camden. and the latter by Sir W. Page Wood, V. C., afterwards Lord Hatherley. Hall, V. C., depreciates the value of the latter decision by supposing Wood, V. C. to have been greatly influenced by what he supposed Lord Camden to have said in *Knapp v. Noyes*. That this was an entire fallacy, and that when Lord Camden said "maintenance and education are confined to minority," he was merely referring to the terms of the will then before him.

On consideration of the case of *Knapp v. Noyes*, I think that Wood, V. C., made no mistake, and that it is Hall, V. C., who has dropped into error, and that when Lord Camden made use of that phrase he was stating what he considered to be a general rule of law.

The testator in *Knapp v. Noyes*, had given £1,500 to each of his five children, by name, to be paid to his daughters respectively at the time of their several marriages with the consent of his executrix and executor, or the survivor, and if any should marry without such consent then he gave her or them so marrying respectively £500, only, and he gave the £1,000 to such of his daughters as and when they should marry with such consent in equal proportions. The testator appointed the same persons who were his executors to be guardians of his daughters during their minority. There was a clause of maintenance "till portions became payable." Mary, one of the daughters, having attained 21, died unmarried. There was no contest as to maintenance and education, the only question was as to Mary's £1,500, whether marriage was the sole time of payment.

Lord Camden was reluctant to decide against Mary's representatives. He thought it very unnatural for a parent to impose a consent to marriage during her whole life. He then searches for reasons to confine the necessity for consent to minority. And he first remarks that the executors were appointed guardians during the minority of the daughters. He thought it a fair construction to say that they were appointed guardians merely with a view to their consent, and the same as if that clause had been inserted in the clause of consent. He then notices the provisions for maintenance "till portions become payable." If the necessity for consent lasted during the life of the daughters the portions would not become payable till they married with consent. But then he says: "maintenance and education are confined to minority," and that being so the portions would become payable when the right to maintenance and education ceased, *i.e.*, when the daughters attained majority, and therefore the necessity for consent was to be confined to minority.

It seems very plain that the remark of Lord Camden was not made as a deduction from the terms of the will then before him; but it was the statement of a general rule of law which applied to the provisions of the will determined their meaning.

Hall, V.C., then relies upon a decision of Shadwell, V.C., in *Soames v. Martin*, 10 Sim. 287, in which he considered that there was nothing to confine a provision for a person's maintenance and education to the minority of that person. It was given for two purposes maintenance and education, and while maintenance would certainly last beyond minority, education would not necessarily end with minority. Hall, V. C., concurs in this view, saying that education at the present day, amongst persons in a certain class and position in life, ordinarily lasts beyond twenty-one, and if the provision for education is not to be so limited to twenty-one why should that for maintenance?

With regard to this remark as to the continuance of a provision for education beyond twenty-one Lord Brougham

says, as quoted by Wood, V. C., 18 Jur. 510, "In fact, although
* * education continues beyond twenty-one, yet after
that age it is generally left to persons to educate themselves; and education after that time is not in any degree
in the nature of a trust."

In *Gardner v. Barber*, 18 Jur. 508, a yearly sum of £50 was given to a granddaughter for her maintenance and education, and this was held to cease on her attaining twenty-one. Wood, V. C., says that in *Badham v. Mee*, 1 R. & M., 631, the same dictum appears as was made use of by Lord Camden. In *Badham v. Mee*, there was the additional words "bringing up," which in *Soames v. Martin*, were thought to make the intention clear that the annuity was to cease at twenty-one. Wood, V. C., could not see any difference either in the etymology of the words or otherwise; he should have thought whatever consequences flow from the use of the one word would equally flow from the use of the other.

In this respect perfectly agreeing with the text from Paul, l. 23, cited above, that *bringing up* and *aliment* were identical.

It may also be remarked that the rule laid down by Hall, V. C., applies to education at the present day, amongst persons in a certain class and position in life, and therefore not a rule of general application.

In *Hamley v. Gilbert*, Jacob. 361, moneys were directed to be paid to a mother to be expended by her at her discretion for or towards the education of her son. Sir Thomas Plumer, M. R., held that the mother was entitled, subject to a trust to apply a part to the education of her son; he must be properly and liberally educated, and so much as the Master may think proper must be set apart for that purpose; his education, however, must terminate with his minority; it cannot go on for ever; and it cannot extend to giving any auxiliary benefits in the future course of his life.

In *Bigelow v. Bigelow*, 19 Gr. 549, the will directed, "The family to be maintained on the place with everything

necessary for their use." Strong, V. C., says, p. 555 "This undoubtedly amounts to a gift of maintenance out of the rents and profits of the estate to each child until the attainment of majority. And like every gift of maintenance this must be taken to mean maintenance during minority."

Following some of these cases I held in *McDonald v. McLennan*, 8 O. R. 176, that a gift for maintenance and education ceased at majority.

A distinction was attempted to be drawn between a gift for maintenance and education, and one for support, maintenance and education as in the present case. I am unable to apprehend the distinction. If we refer to the dictionaries support is explained to mean maintenance, and maintenance to mean support.

Where the testator has himself specified the duration of the maintenance, that will be observed; and such was the case of *Badham v. Mee*, 1 R. & M. 631: in which however the general rule was stated in accordance with *Knapp v. Noyes*, *supra* as has been stated above.

The right to maintenance and support, when given in general terms, will cease with the marriage or forisfiliation of a child: *Carr v. Living*, 28 Beav. 644; *Bowden v. Laing*, 14 Sim. 113.

I have found no case determining what is the right of the widow, to whom a provision for maintenance and support is given, when she passes into second nuptials. There could in such case be no presumption of cesser on majority. But the language of Lord Romilly in regard to the forisfiliation of children would seem applicable to the case of the widow. He says: "If the daughters had married and were supported by their husbands, they could not come and complain that no allowance was made to them. * * Where the children are otherwise provided for, and do not require support or maintenance they are not entitled to complain that they do not receive a portion of the fund which is not required for their maintenance, education, and support." In the present case the widow has married again, and is supported by her husband. I think therefore that

the provision for her support ceases. If she should again become a widow without means of support the provision for maintenance might come again into operation,—unless the provisions of the will should be of such a nature as to prevent it.

It will be observed that the testator gave to his executors and trustees, of whom his wife was one, all his real and personal estate, with a direction to convert all his personal estate into money, and collect his accounts, and pay his debts, and to invest the balance in bank stock or mortgage securities. He directed his trustees to pay to his wife from time to time such money as might be sufficient to support, maintain, and educate his family, and to maintain his wife, in a manner suited to their condition in life, and for that purpose he gave his wife power to collect money and to take therefrom enough to maintain his family and herself, and to render an account to his other trustees. And he directed his sons to pay to his wife annually the sum of \$150, during her life after they received the lands afterwards mentioned, and that sum was made a charge on the lands, but the sons were not to be called on to pay that sum so long as the wife and family were supported and maintained as aforesaid out of his estate. The sum of \$150 per annum was to be in lieu of dower. The trustees were directed to pay \$1000 to each of his daughters when they attained twenty-one, and if there was not sufficient personal estate to pay the same the balance was to be a charge on his real estate. The real estate was to be divided equally between his sons then living when his eldest son attained the age of twenty-five, when his share was to be conveyed to him, and the trustees were to give his eldest son \$2000, to stock his part. The other parts were to be conveyed to his other sons as they attained the age of twenty-five, and the balance of his personal estate after paying the daughters their \$1000 each and the \$2000 to his eldest son was to be divided equally among his sons then living, but the \$2000 was to be taken as a part of his share in the residue.

The provision for the family, and that for the wife are kept distinct. The family, meaning the children: *Ander-son v. Bell*, 29 Gr. 452. The children are to be maintained and educated, which *primâ facie* means till they attain majority. The daughters are then to be paid \$1000 each, a direction that would seem to show an intention on the testator's part that 'support should not be given to them beyond that time, and as the sons and the daughters are all included in the same sentence, the same intention would be inferred in regard to the sons. This is made clearer by noticing that the support, maintenance, and education are to be provided for out of the personal estate, and as the daughters were to receive each \$1000 out of this personal estate, it was diminishing the fund to produce the support &c., and the testator considered that the fund might not be sufficient as he provides for making a charge for the deficiency on the land, and the whole personal estate was to be divided when the lands were divided. The bequest of the \$150 per annum to the wife was not to arise till the sons received the lands, and this was not to be until they respectively reached twenty-five, and was not to be paid so long as the wife and family were supported out of the estate. That is quite consistent with the support of the children ceasing with majority. For before that time the eldest son would, had he lived, have attained twenty-five, and so long as there was any child under twenty-one the widow would with that child be entitled to maintenance, and while such maintenance continued the \$150 were not to be paid.

The case is different with regard to the widow. There is no rule or presumption of cesser on majority in this case. And she would therefore be entitled to support, unless terminated by the second marriage, until the other provision in lieu of dower, came into operation. Now that was not to arise until the sons reached twenty-five, when they were to have the estate conveyed to them. The elder son would have attained twenty-five on the 23rd July, 1883, the younger (there having been only two sons) is

still an infant. Until the sum in lieu of dower became payable, the widow would be entitled to support, and in addition to that to one-third of the rents. When the elder son would have reached twenty-five, she was entitled to charge half the \$150 on his share, and that sum would be deducted from what was requisite for her support. The provision in lieu of dower is of course unaffected by or the second marriage of the dowress. Her right to support out of the personalty would, in any event, cease when she became entitled to the provision in lieu of dower.

The support and maintenance of the children was to be made from the personal estate, not necessarily confined to the income of it, and no part of the rents of the real estate were assigned for that purpose. But the devisees of the real estate not being entitled in possession till they should attain the age of twenty-five years, the intermediate rents would appear to be undisposed of, as there is no residuary bequest: they would then descend upon the heirs at law, *i. e.*, the children, and might properly enough be applied for their maintenance if the personal estate were insufficient for the purpose: 1 *Jarman* on Wills, 3rd ed. 616.

The personalty has turned out to be insufficient for the payment of the legacies, and the question was argued whether the assets are to be marshalled in favour of the \$2,000 given to the son. The legacies to the daughters were to be paid to them on attaining twenty-one respectively, and the \$2,000 to the son to stock his farm, was payable when he was put in possession of it. There are only three daughters living, and all of them are still infants. The elder son attained twenty-five in 1883, and the testator must be taken to have known that fact, and taken it into consideration in making the gifts. There was one daughter who died a few months before attaining twenty-one, and her legacy was divisible between the sons pursuant to the last clause of the will. The next payable would be that to the elder son in 1883. Those to the other daughters are not yet payable.

John J. Cook was paid the share of his deceased

sister's legacy coming to him, but Wm Cook has not received his share, and the master has found him entitled to it as a legacy. The personal estate has turned out insufficient to pay legacies, and the deficiency is chargeable on the real estate devised to the sons. The sons would in that case get the benefit of this legacy by simply allowing it to sink into the land. As John J. has received his half out of the personal estate, the interest of the parties will be properly provided for by deducting the amount received by John from what has been reported due to him upon the \$2,000 legacy, and by striking out the sum found due to W. Cook on account of the deceased sister's legacy. There is, therefore, no ground for marshalling.

The legacy of \$2,000 is payable the first of those remaining unpaid out of the personal estate, then the legacies to the daughters as they successively arrive at twenty-one, and in case of deficiency the daughters' legacies are charged on the land. If the \$2,000 legacy absorbs all the personal estate the daughters get none of it, but they resort to the real estate, and one half is chargeable on the share of the infant plaintiff, the other half on the share of Wm. Cook. The legacy of \$2,000 and the legacy for maintenance must abate proportionally.

G. A. B

[CHANCERY DIVISION.]

McDONALD V. ELLIOTT.

Mortgage—Action on covenant—Statute of Limitations—Rate of interest—Conflicting English and Canadian authorities—R. S. O. c. 108, s. 23.

Held that an action on a covenant in a mortgage for payment of the mortgage money, does not come within R. S. O. c. 108, s. 23 limiting suits for the purposes therein mentioned to ten years.

Allan v. McTavish, 2 A. R. 278, followed in preference to *Sutton v. Sutton*, 22 Ch. D. 511, and *Fearnside v. Flint*, *ib.* 579.

The covenant provided for payment of interest at nine per cent. up to the end of a year from the date of the mortgage.

Held that, there being no evidence why such rate of interest was provided for, and it being matter of common knowledge that nine per cent. was not considered excessive for advances in the year 1866, when the mortgage was made, and some following years, the same rate of interest should be allowed for the years subsequent to the expiry of the first year.

THIS was an action brought by Robert McDonald against Noah Elliott, upon a certain covenant in a mortgage. The writ was issued on February 17th, 1886.

The statement of claim set out that the defendant by deed bearing date the 30th day of October, A. D. 1866, covenanted to pay one Ballantyne his heirs and assigns the sum of two hundred dollars and interest thereon at the rate of nine per cent. per annum until paid: that the said Ballantyne, by deed dated January 11th, A. D. 1886, assigned the said covenant of the said defendant, and his right to receive the moneys due thereon to the plaintiff, who was entitled to recover the said moneys so covenanted to be paid by the defendant: that the said moneys were now overdue and the defendant had not paid the same. And the plaintiff claimed \$200.00 and interest since the 30th day of October, 1866.

In his statement of defence, the defendant denied the allegations contained in the plaintiff's statement of claim, and further set up the Statute of Limitations as a bar to the plaintiff's cause of action; and that in any event the said deed was void for want of consideration, as also the assignment by Ballantyne to the plaintiff if any such assignment

was made : and that between the said 30th day of October, 1866, and the 11th of January 1886, and before the commencement of this action, the said Ballantyne by deed duly executed and made between the defendant on the one part and the said Ballantyne on the other part released the defendant from the said covenant.

The action was tried on April 28th, 1886, at Woodstock, before Rose, J.

J. B. Jackson, for the plaintiff. The Statute of Limitations as to ten years only applies to the remedy as against lands and not to the covenant: *Allan v. McTavish*, 2 A. R. 278. Our Court of Appeal is the Court which should be followed and not the English authorities, as it is the Court of last resort in this Province. See also *Fletcher v. Rodden*, 1 O. R. 155.

G. T. Blackstock and *M. Walsh*, for the defendant, cited *Sutton v. Sutton*, 22 Ch. D. 511; *Fearnside v. Flint*, ib. 579, and contended that the decision in *Allan v. McTavish*, *supra*, was overruled by *Sutton v. Sutton*, *supra*.

May 14th, 1886. Rose, J.—The claim herein is for \$200 and interest thereon at 9 per cent., from the 30th of October, 1866. The action is brought on a covenant contained in a mortgage made by the defendant and assigned to the plaintiff. The covenant is in the usual statutory form for payment of the mortgage money and interest, and the proviso is for avoidance of the mortgage, “on payment of the sum of \$200 of lawful money of Canada, with interest at 9 per cent. per annum, as follows: the said sum of \$200 and interest as above, to be paid at the expiration of one year from the date of this mortgage.”

Mr. Blackstock urged that I should follow *Sutton v. Sutton*, 22 Ch. D. 511, a decision of the Court of Appeal in England overriding, as he contended, *Hunter v. Nockolds*, 1 McN. & G., 640, instead of following *Allan v. McTavish*, 2 A. R. 278, a decision of our own Court of Appeal especially as that decision was founded on *Hunter v*

Nockolds, and that following *Sutton v. Sutton*, I should hold the claim barred.

He further urged that interest should not be allowed at more than 6 per cent.

Mr. Jackson relied on *Allan v. McTavish*, *supra*, and *Fletcher v. Rodden*, 1 O. R. 155. Reference may also be had to *Boice v. O'Loane*, 3 A. R. 167.

If upon examination of the English Act and ours it appears that there is no substantial difference in the language and that the same rules of construction should be applied, then Mr. Blackstock's argument is not without support. In the case of *Trimble v. Hill*, L. R. 5 App. Cas., 342, Sir Montague E. Smith in delivering the judgment of the Privy Council said, at p. 344, "their Lordships think the Court in the Colony might well have taken this decision as an authoritative construction of the Statute. It is the judgment of the Court of Appeal by which all the Courts in England are bound, until a contrary determination has been arrived at by the House of Lords. Their Lordships think that in the Colonies, where a like enactment has been passed by the Legislature, the Colonial Courts should also govern themselves by it."

If I felt bound to consider whether *Sutton v. Sutton*, 22 Ch. D. 511, should bind me, there are some questions of interest which I would wish to hear fully argued before arriving at a decision, but I find that Mr. Justice Proudfoot in *Macdonald v. Macdonald*, 11 O. R. 187, at p. 190, declined to follow *Sutton v. Sutton*, and followed *Allan v. McTavish*, 2 A. R. 278, as the decision of the highest appellate tribunal of this Province.

I observe in *Arscott v. Lilley*, 11 O. R., at p. 185, the Court say that a Court is not bound to follow the decision of a co-equal Court. However that may be, where two or more Judges after consultation take a view different to that of a single Judge, I think I ought to follow the course taken by Mr. Justice Proudfoot, and especially so when I am disposing of a case in the Chancery Division, of which he is a member. It must not be forgotten that a judgment de-

livered in Court, is a judgment of the High Court, whether it be by a single Judge or by two or more Judges in the Divisional Court. It might be well to have the judgments of the High Court consistent with each other, for if each Court follows its own opinion the profession will be left in much doubt. The Division of which I am a member has heretofore felt itself bound to follow any judgment of any Court of co-ordinate jurisdiction.

And I am further of the opinion that in this case it may be well to allow our own Court of Appeal to say whether they will be satisfied to reverse the holding in *Allan v. McTavish*, 2 A. R. 278, and thus change the law of this Province, because of a subsequent judgment of the Court of Appeal in England. I do not feel warranted in endeavouring to anticipate their action when the point comes to be raised before them.

As to the defence founded on the Statute of Limitations, I must hold in the plaintiff's favour.

As to the rate of interest, *St. John v. Rykert*, 10 S. C. R. 278, shews that the covenant only provides for payment of interest at 9 per cent. up to the end of the year from the date of the mortgage. See also *Dalby v. Humphrey*, 37 U. C. R. 514, and cases therein referred to; also *Simonton v. Graham*, 8 P. R. 495.

After the expiry of the year, I must determine what sum I ought to allow as damages for breach of contract. *Primâ facie* the rate stipulated for generally would be taken. Such rate would not be conclusive.

Here I have no evidence but the proof of the mortgage and assignment. The defendant does not appear. I know nothing of the circumstances under which the money was obtained. If the land at the time of the loan was worth say \$600—9 per cent. may have been a liberal interest. If it were scant security—the loan may have been made under the temptation of obtaining the rate agreed upon. Drawing upon the fund of common knowledge, I am aware that in the year 1866 and some following years, 9 per cent. was not considered excessive for advances on town property.

Also that the rate has gradually been lowered until now 6 per cent. is considered a fair if not a full allowance.

I do not see how I can, without any evidence, say that the defendant should not pay the rate stipulated for. At the most I should not average it at a lower rate than 8 per cent., which would make a difference of not more than \$19.50.

Judgment must therefor be for the plaintiff for \$200 principal, and interest from October 30th, 1866, to say April 30th, 1886—a period of 19 years and 6 months—at 9 per cent.,=\$351, in all \$551.00, with full costs of suit.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

MCMILLAN V. GRAND TRUNK RAILWAY AND CANADA
PACIFIC RAILWAY COMPANIES.

Railway Company—Common carriers—Shipment of goods to a point beyond defendants' line—Negligence—Release of co-defendants.

The goods in question were shipped by the G. T. R., by plaintiff's agent in T., to plaintiff at M., Man. After much delay some of the goods were delivered in a damaged condition by the C. P. R., whose line touches at M., and some were never delivered at all. Plaintiff brought his action for \$2,000 damages against the G. T. R., and subsequently the C. P. R. were made party defendants.

The statement of claim charged the G. T. R. on the contract, and the C. P. R. in tort. The G. T. R. set up a special contract, providing, amongst other things, for exemption from liability in case the goods were delayed, lost, or damaged beyond their line, which ended at Fort G. Before trial plaintiff settled with the C. P. R. for \$650, and executed a release to them, reserving his right to proceed against the G. T. R. for the balance, and notified the solicitor for the G. T. R. The plaintiff's agent stated that the contract was a purely verbal one, and that he paid the freight through to M., and received a receipt which he did not read, but forwarded it to plaintiff. Defendants gave evidence that their contracts of shipment were always contained in a bill of lading, signed by the shipper and retained by the company, and in a corresponding shipping receipt, signed by the company and handed to the shipper. The goods in question were carried in a sealed car from T. to Fort G., and the car was still sealed when delivered to the next carriers *en route*. The learned Judge thought there was no evidence of negligence so far as the line of the G. T. R. extended; but it was not disputed that the goods had been damaged and lost by negligence before they reached the plaintiff.

The jury found that the contract was verbal. In answer to questions put by the Court, the foreman stated that the bill of lading was signed by one of defendants' clerks, and that a receipt, with the usual conditions endorsed, was handed to plaintiff's agent at the time of shipment.

Held, that the contract, whether verbal or on one of the company's printed forms, was a through contract from T. to M., and that all corporations and persons employed *en route* were servants of the G. T. R. within the meaning of the Consolidated Railway Act, 1879, sec. 25, sub-sec. 4, and the loss having been admittedly occasioned by negligence, the defendants could not be relieved by any notice, condition, or declaration.

Held, also, that notice of the release to the C. P. R. having been given to the G. T. R. before the trial, the G. T. R. were not entitled to a new trial on the ground of surprise, or the discovery of new evidence.

Held, also, that the G. T. R. and C. P. R. were not joint contractors or joint tortfeasors, and that proof of the alleged release would not relieve the G. T. R. from liability.

STATEMENT of claim :

3. That on or about 23rd May, 1882, plaintiff delivered to defendants, as carriers, nineteen boxes or packages of

goods belonging to the plaintiff, to be safely carried, for reward to them in that behalf, from the city of Toronto to the village of McGregor, in the Province of Manitoba, and there to be delivered to plaintiff in a reasonable time.

4. That defendants, the Grand Trunk Railway Company, duly received said goods for the purpose aforesaid, and plaintiff duly paid them their charges therefor, amounting to the sum of \$17.20, or thereabouts; yet the defendants, the Grand Trunk Railway Company, did not deliver said goods to the plaintiff within a reasonable time, nor did they take due and proper care thereof, but wholly neglected so to do, and so carelessly, negligently, and improperly carried the same, and took such bad care thereof, that by their negligence, carelessness, and improper conduct in that behalf said goods were delayed for a long and unreasonable time in transit, and a large portion thereof was greatly damaged, and the remainder was never delivered at all to plaintiff.

5. That defendants, the Grand Trunk Railway Company, defended this action and set up amongst other defences that said goods were delivered to them by plaintiff, and received by them for carriage and delivery, upon and subject to the terms of a special contract made by and between plaintiff and them, which contract, as they contended, exempted them from all liability for damage or loss occurring to goods beyond the limit of their company; and, furthermore, that said goods were eventually delivered by the Canada Pacific Railway Company, whose line touched at the Village of McGregor, aforesaid, to plaintiff.

6. That the Grand Trunk Railway Company received the charges for the carriage and delivery of said goods at McGregor aforesaid, and never notified plaintiff of the fact that said goods would have to be carried over a portion of the transit by other carriers; and that they were responsible for any loss or damage occurring to the said goods until they had been delivered at their destination: that defendants, the Canada Pacific Railway Company, received a portion of the said charges so paid by plaintiff

to defendants, the Grand Trunk Railway Company, and that said loss, damage, and detention of plaintiff's goods were occasioned by the neglect and improper conduct of both of the said defendant companies, and that they were both liable as such wrongdoers for the said loss, damage, and detention of plaintiff's goods, and plaintiff claimed that one or both the defendant companies was or were liable for the said loss, damage, and detention of plaintiff's goods, and plaintiff claimed \$2,000.

The defendants, the Grand Trunk Railway Company, denied each and every allegation in plaintiff's statement, and said (2) that the said goods were in due course of business, and within a reasonable time, carried from the city of Toronto to the village of McGregor, and they were ready to deliver the same to plaintiff within a reasonable time, but that plaintiff neglected to call for or take the goods away. 3. That said goods were delivered to them, and they received the same for carriage and delivery upon and subject to the terms of a special contract made by and between plaintiff and defendants respecting the carriage and delivery thereof: that one of said conditions was that all goods addressed to consignees at points beyond places at which the company had stations, and respecting which no directions to the contrary should have been received at these stations, should be forwarded to their destination by public carrier or otherwise, as opportunity might offer, without any claim for delay against the company for want of opportunity to forward the same; or they might, at the discretion of the company, be suffered to remain on the company's premises, or be placed in shed or warehouse (if there be such convenience for receiving the same), pending communication with the consignees, at the risk of the owners as to damage thereto from any cause whatever; but the delivery of the goods by the company would be considered complete, and all responsibility of the company, the defendants, should cease when such other carriers should have received notice that the said company, the defendants, were prepared to deliver

the said goods for further conveyance, &c., &c.; and it was expressly agreed in and by said condition that the defendants should not be responsible for any misdelivery, damage, or detention that might occur, if his said goods arrived at said stations or places on their line nearest to the points or places which they were consigned to, or beyond their said limits. 4. That no claim for damage to, or loss of, or detention of any goods for which the defendants were accountable, should be allowed unless notice in writing and the particulars of the claim for said loss, damage, or detention, were given to the station freight agent, at or nearest to the place of delivery within thirty-six hours after the goods, in respect of which said claim was made, should be delivered. 5. That Fort Gratiot, in the State of Michigan, was the station on defendants' line of railway nearest to the point or place to which said goods were consigned, and that the said village of McGregor was a point or place beyond any place where defendants had stations, which plaintiff well knew. 6. That defendants did safely and securely, and with all reasonable despatch carry said goods from Toronto to Fort Gratiot, and there did deliver the same to the Chicago and Grand Trunk Railway Company, whose lines extended from Fort Gratiot to Chicago, and which was on the way or route from Toronto to the village of McGregor: that the Chicago and Grand Trunk Railway Company were public carriers. 7. That any, loss, damage, or detention which happened to said goods, if any, happened to them after the said goods were so delivered to said Chicago and Grand Trunk Railway Companies, and after they had passed out of the control of defendants and were beyond the limit or jurisdiction of defendants, and therefore for any such defendants were not responsible. 8. That said goods were afterwards delivered by the Canada Pacific Railway Company, whose lines touched said village of McGregor, to plaintiff, and plaintiff did not, within thirty-six hours after said delivery, deliver to said station freight agent, or to any one for defendants, notice in writing of

said claim, with the particulars thereof, as required by said condition above stated 9. That when plaintiff delivered said goods to defendants at Toronto, as alleged, he made a further agreement with defendants regarding the carriage and delivery of said goods, in and by which, for the good and valuable consideration therein mentioned, plaintiff released all the railway or steamship companies, over which said goods might pass to destination, from all damage that might occur to said goods arising from leakage or delay, or breaking, chafing, or loss or damage from the effects of heat or cold, water or fire, and from the consequences of delay in shipment, and in the transportation and delivery; and he thereby agreed to hold said railway or steamship companies harmless, and protect them against any claim that might arise from damage as above specified, and guaranteed that the through charge, unless prepaid, should be paid at destination, as per bill of lading or company's tariff. 10. That defendants were one of the companies contemplated by said last mentioned agreement, and that the loss or damage complained of arose after said goods had gone on their way beyond defendants' line, as above in this statement of defence set out, and were such as were covered by the said release and guarantee, and that plaintiff had no claim upon these defendants in the premises.

Issue.

The cause was tried at the last winter sittings of this Court, at Toronto, by Rose, J., and a jury.

It appeared that one John McMillan, on the 23rd May, 1882, shipped by defendants, the Grand Trunk Railway of Canada, fourteen packages of goods belonging to plaintiff, to the plaintiff at McGregor Station, in Manitoba, paying to defendants, the Grand Trunk Railway Company of Canada, the charges for the carriage thereof to the McGregor Station, amounting to \$17.20: that the goods were never delivered to plaintiff at McGregor, but he got twelve of the packages at Portage La Prairie Station in a greatly damaged condition, having been damaged by

water ; but where or how did not appear, and two of the packages he never got. The goods were shipped in a sealed car from Toronto to Fort Gratiot, and the car was still sealed when delivered to the next carriers *en route*.

The other facts appear in the judgments.

After the commencement of the action the plaintiff settled with the defendants, the Canada Pacific Railway Company, for a portion of his claim, reserving all his rights against the other defendants.

At the trial, on the return of the jury, the following took place :

His Lordship—Do you find that the delivery note was signed by John McMillan ?

The Foreman—No, we believe it was a verbal agreement.

His Lordship—And you think that he did not sign that paper ?

The Foreman—We think that he did not sign it.

His Lordship—Do you think there was a written receipt given to him for the money ?

The Foreman—We think so.

His Lordship—And do you believe that written receipt to be the counterpart of the delivery note ?

The Foreman—We think so.

His Lordship—Then, as I understand it, the arrangement was that McMillan went down and made the terms for the carrying of the goods ?

The Foreman—Yes.

His Lordship—The goods were delivered and he paid the money ?

The Foreman—Yes.

His Lordship—And took the receipt on one of the forms of the company ; but you do not find that he signed any request to them in the form that is given there ?

The Foreman—No.

Mr. Nesbitt—Would your Lordship ascertain from the jury whether they found, as a fact, how that got into the possession of the company.

His Lordship—Did you consider at all how that document was prepared, or come to any conclusion?

The Foreman—Well, we think that that was signed, as they are many times done, by one of the clerks in the office.

Mr. Galt—There is one question that really suggested an answer; that is, that the receipt that was given on one of the ordinary forms of the company I do not think the jury intended to find was the ordinary receipt form of the company, because I think no evidence has been given of that.

His Lordship—You have heard the observations of counsel, did you consider the form in which the receipt was given, was it on a document similar to the papers you have before you?

The Foreman—We think it was.

Mr. Nesbitt—Would your Lordship ascertain from them whether they think this was done.

His Lordship—Did you consider whether or not that paper was signed by the clerk in the office in Mr. McMillan's presence, or whether he had knowledge of it?

The Foreman—We do not think that he had any knowledge of it.

Mr. Galt—There is one more observation I would like your Lordship to ask, and that is as to whether it was the intention of the parties that the receipt should be any part of the contract.

His Lordship—I could not leave that question.

Mr. Galt—The Foreman has already said that they found that the contract was a verbal one.

His Lordship—I do not think I can ask that question.

Mr. Nesbitt—Would your Lordship ask them whether they found the shipping bill was delivered prior to the receipt of the goods by the Grand Trunk Railway,

His Lordship—I think I have asked them sufficiently as to that.

The learned Judge, having reserved his decision, subsequently gave the following judgment:

ROSE, J.—This is an action against the above defendants claiming relief against one or both.

At the trial the plaintiff adduced no evidence as to the Canada Pacific Railway Company, saying, as I understood, that it had paid the plaintiff something and would not appear. The trial was confined to the liability of the Grand Trunk Railway Company.

Since the trial the company has applied to be permitted to offer evidence of settlement by the plaintiff with the company, so as to raise a further defence. I have declined to hear further evidence, as all disputed questions were disposed of by the jury, and I think, therefore, if any relief is to be granted it should be by the Divisional Court.

The case was heard for the most part on admissions. The only fact left to the jury was whether or not the goods were carried on an oral or written agreement.

It was admitted that the plaintiff's brother, acting for the plaintiff, arranged with the Grand Trunk Railway Company for carriage of the goods to McGregor station, N.W.T.: that the goods were carried by that company and its connections, and after much delay delivered to the plaintiff in a damaged condition. It was shewn beyond dispute that such damage did not occur on the Grand Trunk Railway, but I believe it was stated that it arose from negligence in transshipping the goods at Winnipeg by the Canada Pacific Railway Company into a car that allowed the rain to come in and thus to injure the goods; and the amount of plaintiff's damage was not disputed. The claim, if plaintiff is entitled to succeed against the Grand Trunk Railway, may be stated at \$1,350.

The jury found that the goods were delivered under an oral agreement: that the shipper paid the freight and took a receipt with the usual conditions endorsed: that he did not sign a delivery note, that a delivery note was signed by a clerk in the employ of the Grand Trunk Railway Company for the shipper without his knowledge, and that he knew nothing of the conditions endorsed.

Mr. Galt asked me to leave it to the jury to say whether

it was the intention of the parties that the receipt should be any part of the contract. I thought that was covered by their prior answer shewing that the agreement was by parol.

It was clearly the intention of the jury to find that the shipper shipped the goods on a parol agreement made the day before the goods were sent for : that the goods were sent for by the company after such agreement was made : that after the goods reached the defendants' premises the shipper went to the defendants' office and saw the goods weighed, the amount of freight ascertained, and paid it without so far having been apprised of any conditions upon which the defendants claimed to receive them : that he signed no delivery note, and was not requested to ; but that such note was signed by some one in the office to warrant the receipt of the goods by the man whose duty it was to ship them on board of the cars ; and that no special agreement was made or assented to.

The shipper swore that he did not know if he got a receipt, or what was on it, and the jury have believed him, else they would not have been able to find an oral agreement.

My charge must be referred to, in order to ascertain the meaning of the first answer given by the jury.

I directed them that "If you believe that the goods were received by the Railway Company at the request of Mr. John MacMillan, and that request is evidenced by this paper which is produced before you, and they gave him a receipt which substantially shews the same, then I will ask you to say the contract is evidenced by these papers. If you believe, on the other hand, that Mr. MacMillan went there and made an oral arrangement for the receipt and shipment of these goods, that he was not asked to sign and did not sign any paper asking the company to receive these goods, and did not receive from them a receipt for the money he paid, which evidenced an agreement by the company to take these goods forward on the terms and conditions that are here shewn, then I would ask you to find the other way."

When they returned I asked them as to the first part of the question, "Do you find that the delivery note was signed by John MacMillan," and they answered, "No, my Lord," which is a complete answer to such portion of the question, and then added, "We believe it was a verbal agreement," evidently referring to the latter part of the question. I think I must, therefore, in order fairly to give effect to what I believe was their answer, treat them as finding that the receipt was not given or received as evidencing an agreement by the company to forward the goods on the terms and conditions that are shewn upon it.

At the close of the case Mr. Nesbitt moved for a nonsuit. It was agreed that the grounds of nonsuit might be stated and argued with the motion for judgment.

If, therefore, there was no case to be submitted to the jury, I should now enter judgment of nonsuit.

The motion for nonsuit rests, as I understand it, upon the ground that the shipper having accepted the receipt with the conditions endorsed, must be held bound by the conditions and the company's liability be limited accordingly.

If so, then as the injury to the goods was occasioned after the goods had been carried by the Grand Trunk Railway Company to the end of its line, and delivered to the Canada Pacific Railway Company, and while in the custody of the Canada Pacific Railway Company, under condition 10 the liability of the Grand Trunk Railway had ceased, and the plaintiff must fail as against it.

The cases chiefly relied upon are *Hill v. Syracuse, Binghampton, New York R. W. Co.*, 73 N. Y. R. (1878), and *Rennie v. The Northern R. W. Co.*, 27 C. P. 153.

The first is a decision of the Court of Appeal of the State of New York and is "that the receipt or bill of lading delivered to the plaintiff is to be regarded as the contract between the parties, instead of the parol agreement alleged to have been made previously, but on the same day between the plaintiff and the person in charge representing the agreement."

The decision in *Bostwick v. The Baltimore and Ohio R. W. Co.*, 45 N. Y. 712, is referred to and distinguished, and is stated as not intended to impair the general and well settled rules that when goods are to be delivered to a carrier for transportation, and a bill of lading or receipt is delivered to the shipper, he is chargeable with notice of its contents, and is bound by its terms, and that prior parol negotiations cannot be resorted to vary them. In that case the property had been shipped by the carriers before the bill of lading was delivered, and was beyond the reach or control of the shipper.

It was further said : " In this case the receipt was made immediately upon the receipt of the property, and delivered very soon after, the intervening time being while the plaintiff was getting his team preparatory to starting home. By accepting the contract without objection the other party had the right to assume that he assented to its terms, and the fact of not reading it cannot be interposed to prevent the legal effect of the transaction. If he was not satisfied with its terms, he had there abundant opportunity to reclaim his property, or insist upon a modification of its provisions, but he did neither."

Every word of the above would apply to the facts of this case. The oral agreement of the day before was followed by a delivery of the goods on the day the receipt was given; while the goods were at the station the shipper attended and saw them weighed, the freight ascertained, and paid the freight; he either read or must be taken to have read the conditions, and went away without making any objection. If he was not satisfied with its terms he had then abundant opportunity to reclaim his property, or insist upon a modification of its provisions; but he did neither.

In the case of *Rennie v. The Northern R. W. Co.* there was a written agreement between the parties providing for the carriage of freight for the season of 1874, and a shipment under that agreement.

At the time of shipment a shipping note or receipt,

similar to the one given herein, was given to the plaintiff with similar conditions endorsed.

The complaint was as to misdelivery.

The company relied on the 10th condition.

It was contended that the general contract governed. The learned Judge at the trial, and subsequently the full Court, held that the terms of the shipping note governed and so found for the defendants.

The principle governing the case in the New York Court of Appeals, and the case in our own Court, seems to be the same, and if so, I should not have left to the jury any question, but should have ruled that the defendants being protected by the terms of the written receipt were not liable. There was no question of fact in dispute to be decided.

If on the facts only one inference can be drawn, it is, as I understand it, the duty of the Judge to take the case into his own hands, and not to go through the form of submitting the matter to the jury, with a direction to find either for the plaintiff or defendant, as the case may be: *Wright v. Midland R. W. Co.*, 57 L. T. N. S. 539; *Ryan v. Canada Southern R. W. Co.*, 10 O. R. 753.

If I am correct in my reading of the *Rennie Case*, then, if necessary to leave the case to the jury, I should have directed them that there was no question of fact to be submitted to them, but they must find that the plaintiff was bound by the terms of the receipt, and the defendants entitled to the benefit of the condition; and if the jury found that the receipt was not binding on them, the verdict could not stand. That form would seem to be unnecessary.

In my opinion, therefore, I must give effect to the motion for nonsuit.

If I am wrong in my view, the plaintiff has possibly his case in as good a condition as he could have to obtain full relief.

There must be judgment for the defendants, the Grand Trunk Railway Company, dismissing the action, with costs.

On the 20th day of May, 1886. *W. Nesbitt*, on behalf of the defendants, the Grand Trunk Railway Company, moved, in anticipation of a motion by plaintiff, for an order *nisi* to set aside the findings of the jury, and to enter them for the defendants, the Grand Trunk Railway Company, or for a new trial, on the ground that the said findings were against evidence, and the weight of evidence, and on the ground of the discovery, since the trial, of new and material evidence, and on the ground of surprise, and on grounds disclosed in the affidavit of John Bell.

On the 22nd May, 1886, *A. C. Galt* moved for an order *nisi* to set aside the judgment and on the 31st May he also moved to set aside the judgment, and to enter it for the plaintiff, and supported his motion for an order *nisi*, and shewed cause to the defendants' motion.

A. C. Galt, for the plaintiff. The only question left to jury was, whether the contract was verbal, as alleged by the plaintiff, or written on one of the company's forms, as alleged by the defendants. It is true that in answer to a question by the Court, the foreman of the jury said they thought that plaintiff's agent took a receipt from defendants, at the time of shipment, with the usual conditions indorsed; but the contents of this receipt were not proved, and it is clear that the jury found that it formed no part of the contract. See *Childs v. Great Western R. W. Co.*, 6 C. P. 284; *Vogel v. Grand Trunk R. W. Co.*, 10 A. R. at pp. 172, 173, 174, and 183. To render the contents of such a receipt binding, the defendants must shew knowledge of and assent to its terms, and they failed to do so. See *Peek v. North Staffordshire R. W. Co.*, 10 H. L. Cas., pp. 496 and 581; *Woods' Railway Law*, pp. 1577, 1578, and notes. But whether the contract was verbal or written is immaterial, for the receipt relied upon shews a through contract from Toronto to McGregor, Manitoba; and the defendants received payment of the freight for the whole distance. Under these circumstances all inter-

mediate carriers became "servants" of the defendants for the purpose of this contract, within the meaning of the Consolidated Railway Act, sec. 25, sub-sec. 4, and it being admitted that the goods were lost and damaged by the negligence of some of the carriers *en route*, the defendants cannot rely upon the conditions set up. See *Muschamp v. Lancaster*, 8 M. & W. 421; *Machu v. London and South Western R. W. Co.*, 2 Ex. 415; *Collins v. Bristol and Exeter R. W. Co.*, 7 H. L. Cas. 194; *Railroad v. Lockwood*, 17 Wallace 357. The conditions relied upon by the defendants are contrary to the policy of the common law, and are void: *Story* on Bailments, secs. 570, 571; *Fitzgerald v. Grand Trunk R. W. Co.*, 4 A. R. pp. 624, 5, 6.

Nesbitt, contra. The jury found that plaintiff's agent received one of the company's usual conditional receipts at the time of the shipment. The plaintiff is bound by the contents of the receipt as if he had himself received and read it, just as in the case of an insurance policy. The defendants' Act of Incorporation is a Public Act, and therefore the plaintiff must be taken to know that their line extends only to Fort Gratiot. The receipt provides that the defendants are not to be liable for losses occurring after the goods have gone beyond defendants' line, and the evidence disproves any negligence on defendants' line. The contract therefore is virtually a contract to carry to Fort Gratiot only, and merely to forward the goods beyond that point. He referred to the following authorities: *Smith v. City of London Insurance Co.*, 11 O. R. 38; *Hill v. Syracuse*, 73 N. Y. 353; *Southern Express Co v. Dixon*, 94 U. S. 49; *Robinson's & Joseph's Dig.*, 3190, 3194.

June 29, 1886. ARMOUR, J.—I do not think we can interfere on the grounds disclosed in Mr. Bell's affidavit.

The defendants, the Grand Trunk Railway Company, by their statement of defence set up a special contract for the carriage of the goods in question in answer to the plaintiff's statement charging them as public carriers on a

general contract to carry. The onus was therefore upon the defendants the Grand Trunk Railway Company of shewing such a special contract, and they gave evidence in support of it, and it is no ground for granting a new trial that they were taken by surprise at its being denied, for that was one of the questions for trial, and they ought to have been prepared to prove it.

The cause was tried on the 13th day of January, 1886, and on or about the 23rd day of December, previous, the solicitor of the defendants, the Grand Trunk Railway Company, was notified by the plaintiff's solicitor that the plaintiff had settled with the defendants the Canada Pacific Railway Company, reserving his rights against the defendants the Grand Trunk Railway Company; and a release is now produced, dated the 14th day of November previous, containing this provision, that nothing therein contained should operate to prevent the plaintiff from prosecuting his action and enforcing his claim against the defendants the Grand Trunk Railway Company, for the amount claimed therein, after deducting the said sum of six hundred and fifty dollars, the right to which was thereby expressly reserved. Mr. Bell states in his affidavit that he was not aware of any release or paper of that character having passed between the plaintiff and the other defendants until after the trial of the cause, but he does not shew that he did before the trial what he has since done with success, apply to the defendants, the Canada Pacific Railway Company, for the papers that passed between the plaintiff and them upon the settlement, of which he had been notified by the plaintiff's solicitor.

No application was made to plead this settlement, nor to postpone the trial to enable it to be pleaded and proved, and the defendants, the Grand Trunk Railway Company, having gone down to trial without having done so, cannot now be granted a new trial in order to enable them to do so.

But if it were set up it would afford no answer to this action. The defendants are not joint contractors nor joint

tortfeasors, and the payment by the defendants, the Canada Pacific Railway Company, of a portion of the damages claimed, not accepted in satisfaction, except of so much, with the right of the plaintiff to proceed for the residue of his damages against the defendants, the Grand Trunk Railway Company, is no bar to the action.

In the view that I take of the liability of the defendants the Grand Trunk Railway Company, the proof of a special contract, such as they attempted to establish at the trial, would not aid them, and we must, therefore, refuse their motion for an order *nisi*.

This view also renders it unnecessary for me to determine whether there should not have been a finding by the jury that the conditions on the back of the receipt were brought to the knowledge of the shipper, or that he knew there were conditions on the back of it, or that the railway company did what was reasonably sufficient to give him notice of the conditions—see *Parker v. The South Eastern R.W. Co.*, 2 C. P. D., 416—and we must therefore refuse the plaintiff's order *nisi*.

I think that this case is governed by the decision in *Vogel v. Grand Trunk R. W. Co.*, 2 O. R. 197, 10 A. R. 162.

The contract of the defendants, the Grand Trunk Railway Company, was to carry the plaintiff's goods from Toronto to McGregor station, Manitoba, and they were paid their charges for the carriage to McGregor station. The goods were lost and damaged in their carriage to that place by the negligence or omission of the defendants, the Grand Trunk Railway Company, or their servants, their servants including all those corporations and persons employed to do for them what they contracted to do—see *Machu v. London and South Western R.W. Co.*, 2 Ex. 415; *Doolan v. The Midland R.W. Co.*, L. R. 2 App. Cas., 792—and the defendants the Grand Trunk Railway Company are consequently not to be relieved from this action by any notice, condition, or declaration.

In my opinion, therefore, the judgment must be entered

for the plaintiff for the sum of \$1,350, the amount assessed by the learned Judge, with full costs of suit.

O'CONNOR, J., concurred.

WILSON, C. J., not having been present during the argument, took no part in the judgment.

Judgment accordingly.

[CHANCERY DIVISION.]

PLATT V. THE GRAND TRUNK RAILWAY COMPANY OF
CANADA.

Covenant for quiet enjoyment—Covenant for title—Breach—Damages—Set-off of arbitration damages—Different causes of action—Mortgagees—Parties.

On February 3rd, 1873, the company granted to A. T. P. (through whom S. P. the original plaintiff in this action claimed) a mill site on the river Maitland with certain easements, one of which was the right to erect a dam across the river high enough to take up eight feet of the fall of the river, the location of the dam being defined by the deed, and covenanted that they had the right to convey and for quiet enjoyment. The company had previously granted (without reserving any of the easements granted to A. T. P.) an island in the river called "Island C," and two parcels of land, one on each bank, immediately opposite each other, and adjoining the property of the plaintiff, called respectively "The Great Meadow," and "Block F", all three of which were above the land granted to A. T. P., and subsequently became the property of H. Y. A.

In an action by S. P. (who died after action brought, M. A. P. being made plaintiff by order of revivor,) against the company, it was alleged and proved that a dam could not be maintained across the river high enough to take up eight feet of the fall of the river without submerging a great part of, if not the whole of "Island C," and penning back water and ice on "The Great Meadow," and "Block F," and encroaching upon the rights of H. Y. A. as riparian proprietor of the said lands.

It was contended on the part of the defendants that the mortgagees of the property should be made parties.

Held, that O. J. A. sec. 17, sub-sec. 5, enables a mortgagor, entitled to the possession of land, as to which the mortgagee has given no notice of his intention to take possession, to sue to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, and that the objection for want of parties ought not to prevail.

Held, also, that in an action on a covenant for quiet enjoyment, a plaintiff must show an interruption or obstruction of the easement in order to entitle him to recover, and that S. P. not having attempted to enjoy his easement by building a dam in the place and manner specified, and not having been interrupted, he could not succeed on the covenant for quiet enjoyment.

Held, also, as to the covenant for title, that as the Supreme Court of Canada had decided in *Platt v. Attrill*, 10 S. C. R. 425, that the company had no right to grant the easement to A.T. P., that decision was binding here, although the company were not parties to the suit; and that the covenant was broken as soon as it was made, and the plaintiff was entitled to such damages as accrued during the life of S. P.; and following *The Empire Gold Mining Co. v. Jones*, 19 C. P. 245, that the damages would be the difference in money between the value of the estate that had passed, and that which the deed purported to convey, and the company covenanted they had the right to convey.

It appeared that during S. P.'s ownership, the Government had constructed a breakwater at the mouth of the river, and that S. P. had been awarded damages "on account of the penning or damming up of the waters by the construction of the breakwater, and forcing them back on S. P.'s property," and on another account not material to this action.

Held, that as the sum awarded was a lump sum for both accounts together, and as the evidence on the arbitration shewed that the breakwater only affected S. P. to the extent of three feet of water, leaving him a fall of five feet, the value of which could only be ascertained by a reference, and as the subjects of the arbitration and the action on the covenant were not the same, the company were not entitled to set off the money recovered from the Government against their liability for damages for their breach of contract.

Held, also, that the registration of the previous conveyances, even if that was notice, was no bar to a recovery on the covenant.

The plaintiff, therefore, was held entitled to damages for breach of the covenant for title, and a reference was directed.

THIS action was brought by Samuel Platt against The Grand Trunk Railway Company of Canada, but before it was heard the plaintiff died, and Mary Ann Platt was made plaintiff by order of revivor.

The plaintiff claimed damages against the defendants for breaches of covenants for title and quiet enjoyment under the circumstances set out in the judgment.

The trial took place at Goderich, on March 16th, 1886, before Proudfoot, J.

James Maclellan, Q. C., and *M. C. Cameron*, for the plaintiff. The plaintiff is entitled to damages as the Supreme Court has decided in *Platt v. Attrill*, 10 S. C. R., 425, that the reason he failed in that suit was that his deed was subsequent to deeds of other properties which would be affected by the dam, the right to which the defendants

undertook to grant and covenant for. If the plaintiff erected a dam, as provided for by the defendant's covenant, the water would be backed up on other parties' land and they would be injured, and the plaintiff has no right to do that. The recovery of compensation for injury done by the Government works, does not apply to the injury now complained of, and even if it did, the plaintiff might still be able to use the five foot head of water left by the Government.

S. H. Blake, Q. C., Cassels, Q. C., and Garrow, for the the defendants. The mortgagees of the property should be made parties; even if one of them is paid off, the title is still outstanding. The statement of claim does not shew any eviction, and there is not, therefore, any breach of covenant for quiet enjoyment. The evidence shews that the suit of *Platt v. Attrill, supra*, in the Supreme Court, was in reference to a dam much higher up the river than the one covenanted for and in question in this case. This action, to be successful must shew damage from a breach of the covenant. Platt had a mere license to do that which he says is impossible to do. There can be no damage now as the Government has already paid Platt for every damage he could suffer. Where a plaintiff has elected to sue one of two persons liable, and has recovered judgment, he cannot afterwards sue the other for the same moneys: *Windsor v. Regina*, 10 S. C. R. 338 at 374. There was no covenant applicable and no eviction. Mere apprehension, without some show of injury, will not ground a complaint. There was no attempt to build the dam which was interfered with by anyone. The *onus* lay on the plaintiff to shew the cause of the alteration in the bed of the stream: *Birnett v. Morris*, L. R. 1 H. L. Sc. 47; *Wadsworth v. McDougall*, 24 Gr. 1. This case does not come within the class where a personal representative can sue and no damages can in any event be recovered, except what may have accrued in Platt's lifetime. As to the covenant for quiet enjoyment: *Leech v. Schweder*, L. R. 9 Ch. 463, 477. There is no remedy except there was misrepresenta-

tion: *Thackeray v. Wood*, 5 B. & S. 325, affirmed 6 B. & S. 766; *Watson v. Troughton*, 48 L. T. N. S., 508; *Ogilvie v. Foljambe*, 3 Mer. 53; *Spoor v. Green*, L. R. 9 Ex. 99; *Bennett v. Buchan*, 76 N.Y. 386. There should be nominal if any damages: *Rawle*, on Covenants, 4 ed., 262, 264; *Post v. Campau*, 42 Mich. 90; *Childs v. Stenning*, 11 Ch. D. 82. The decree in *Platt v. Attrill*, *supra*, was not an eviction: *Sanderson v. The Mayor, &c., of Berwick-upon-Tweed*, 13 Q. B. D. 547; *Howard v. Maitland*, 11 Q. B. D. 695; *Peters v. Bowman*, 98 U. S. R. 56.

MacLennan, Q.C., in reply. The absence of the mortgagees as parties is only at best a formal objection, and could be cured if necessary by their consent to be bound by the judgment. The defendants must apply to have parties added: *The Vickers Express Co. v. Canadian Pacific Railway Co.*, 9 O. R. 251. There was no mode in which the easement could be enjoyed. An interruption is an eviction of an easement, and the plaintiff had the use of the water and was deprived of it. The claim against the Government was limited to two subjects, viz., (1) breakwater, and (2) right of way. The damages were not awarded separately. The breach of the covenant for title was really made when the deed was made. There is an eviction shewn as to the covenant for quiet enjoyment. See also *Miner v. Gilmour*, 12 Moore P. C. 131.

April 28, 1886. PROUDFOOT, J.—The plaintiff brings this action for damages for breach of covenant for seisin, and of covenant for quiet enjoyment, contained in a deed made by the defendants to Alex. T. Patterson, on the 3rd day of February, 1873. By that deed the defendants in consideration of \$5,100, granted to Patterson a mill site on the river Maitland, also the easement and privilege of erecting and maintaining a dam upon and across the river Maitland, so high as to take up eight feet of the fall of the river, but no more; also the easement and privilege of constructing and maintaining a sufficient head race from the said intended dam to the said mill site; also the ease-

ment and privilege of a roadway leading through the lands of the said railway company from the mill site to the boundary of the lands of the railway company in the direction of North street; also the easement and privilege of constructing a switch from the mill site to the main line of the railway, near Goderich harbor, in so far as the same shall run on, over, or through the lands of the railway company.: then followed a minute description by metes and bounds of the lands so granted. (The eastern extremity, up stream, is to the head gates of a then existing head race, and the dam authorized by the deed, must therefore have been a little to the west, or down stream, from these head gates.)

The railway company covenanted with Patterson that they had the right to convey the said lands, notwithstanding any act of the company; and that Patterson should have quiet possession of the said lands free from all incumbrances. The deed was made in pursuance of the act respecting short forms of conveyances, and these covenants are to be read therefore as made with Patterson his heirs and assigns. And the word *lands* extends to all freehold tenements and hereditaments, whether corporeal or incorporeal.

By an indenture made the 22nd February, 1873, Patterson by deed of that date, in the usual short form, granted the said premises to Arthur Tew, in consideration of \$4,000. And on the 4th December, 1875, by a similar deed, Tew granted the said premises to Samuel Platt, who died after this action was commenced, and is now represented by the plaintiff.

On the 4th December, 1875, Samuel Platt mortgaged the premises to Tew by a deed conveying the legal estate, on the 5th December, 1876, made another mortgage to Tew, and on the 1st October, 1880, mortgaged the premises to Cameron,—these mortgages are all outstanding.

On the 3rd June, 1871, the defendants granted to one A. Smith, a parcel of land called "Island C," situate in the River Maitland, just above the land described by metes and bounds in the deed to Patterson, without reserving

the easements and privileges granted to Patterson. On the 15th December, 1879, A. Smith granted to H. Y. Attrill, without reserving the easements and privileges granted by the defendants to Patterson.

On the said 3rd June, 1871, the defendants granted to John McDonald, a parcel of land known as "The Great Meadow," lying in the bank of the river Maitland, just above the lands granted to Patterson, without any reservation of the easements and privileges granted to Patterson. On the 31st July, 1873, John McDonald died, having first devised the land to Mary McDonald, who, on the 5th of August, 1876, granted the same to H. Y. Attrill, without reserving any of the easements or privileges granted to Patterson.

On the same 3rd June, 1871, the defendants granted to A. M. Ross a parcel of land lying and being alongside of and extending above the land granted to Patterson, and abutting upon the river Maitland, and known as "Block F," without reserving any of the easements and privileges granted to Patterson. And Ross, on the 7th December, 1876, granted the same to H. Y. Attrill, without reserving any of the easements and privileges granted to Patterson.

"The Great Meadow," and "Block F," are directly opposite each other, separated by the river Maitland, and since the 5th August, 1876, and 7th December, 1876, have been owned respectively by H. Y. Attrill.

The plaintiff alleges, and the evidence establishes, that neither at the date of the grant to Patterson, nor at any time since could a dam be erected and maintained upon and across the river Maitland so high as to take up eight feet of the fall of the said river, but no more, without submerging a great part, if not the whole, of "Island C," and without damming and penning back the waters of the river on "The Great Meadow" and "Block F," and without penning back ice and filling up the channel of the river with water to a much greater extent than in the natural flow of the river, and without invading and encroaching upon the rights of the said H. Y. Attrill, as a riparian pro-

prietor of the said lands, and other lands abutting on the said river and immediately adjoining the lands granted to Patterson above and below (Block A,) the same on the river, &c.

By reason of the grants to A. Smith, J. McDonald, and A. M. Ross, the defendants had not at the date of the grant to Patterson, nor at any time since, good right, full power, and absolute authority to convey the lands and other the premises purported to be conveyed to Patterson, and in fact the defendants had no right to convey the said easement and privilege of erecting and maintaining upon the river a dam of the height necessary to give eight feet head of water, whereby the said S. Platt incurred loss, &c.; that Attrill, having lawful authority, obstructed S. Platt in the use of the easement of erecting and maintaining any dam upon and across the river of any height whatever.

S. Platt thereupon, relying upon his said title from the defendants, took proceedings in Chancery against Attrill to restrain him from obstructing and hindering the said S. Platt from the use and enjoyment of the said easement and privilege, and such proceedings were thereupon had that ultimately the suit was dismissed with costs, by reason of which the plaintiff has sustained damages, &c.

The plaintiff claims \$5,000, the costs of the said Chancery suit, an account of the damages he has sustained through the breach of the said covenants for title and quiet enjoyment. The costs of this action, and further relief.

The defendants deny the allegations in the statement of claim, and say

That a map was annexed to the deed to Patterson, drawn to scale and shewed exactly what was intended to be conveyed, and the description in the deed corresponded with it, and that S. Platt has not at any time since the execution of the deed been interfered with, or interrupted by the defendants, or any one claiming under them, in the enjoyment of the premises conveyed to Patterson.

That at the time of the alleged interference by Attrill, S. Platt was claiming against him the right to interfere

with the waters of the river by means of a dam and race way which were not authorized by the deed to Patterson, and Attrill was the owner of Block A, not derived from the defendants, and the Supreme Court held him entitled to interfere with S. Platt's use of the waters of the river by means of a dam, as an unlawful invasion of Attrill's rights as riparian proprietor in respect of Block A.

That the deeds by the defendants to Smith, McDonald, and Ross, had each a plan annexed, and the descriptions shewed clearly what these deeds were intended to convey, and the deeds and plans were registered before the deed to Patterson, who had before the deed to him full notice and knowledge of the contents of these conveyances, and with the full understanding that the deed to him was confined simply to the lands mentioned in it and the plan, and the exercise of the rights mentioned therein on the said lands he took and accepted the same from the defendants.

That S. Platt and those under whom he claims took the property with a full knowledge of these facts.

That the deed to Ross covers no part of what is described in the deed to Patterson, and that defendants granted no easement or right inconsistent with the deed to Ross. The same as to the deed to Smith.

That by the deed to Patterson the defendants granted no right to flood the lands previously conveyed to Smith.

That Patterson and S. Platt knew the locality and the height to which a dam on the land could be made, and knowing this they took the deed and intended only to have and enjoy the rights and powers therein given and no greater.

That S. Platt erected a dam across the river beyond the premises conveyed to Patterson and has never put or maintained a dam on the site intended by the said deed and the damage sustained by the plaintiff, if any, has been caused by his own wrongful act.

That S. Platt has suffered the said mill site and mill race to go to waste, and has not attempted to put a dam on the site intended by the deed, and the eight feet was only in-

tended as a maximun height to which the dam might be raised if practicable to do so.

That the legal estate is now outstanding.

A supplementary answer was filed, but has not been left with me, setting up that the plaintiff had been compensated by the Government, for the loss of his mill site, caused by the erection of a breakwater at the mouth of the river.

The objection for want of parties ought not to prevail. The Judicature Act, s. 17, ss. 5, enables a mortgagor, entitled to the possession of land, as to which the mortgagee has given no notice of his intention to take possession, to sue to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only. That was the position of S. Platt when he instituted this action, and the language is wide enough to cover the claim for which this action was brought. This is a special provision in regard to mortgagors, and such cases as the *Vickers Case* 9 O. R. 251, have no application. Prior to the Judicature Act the rule was different, and the legal estate not being represented was an answer to the action: *Swan v. Adams*, 23 Gr. 220.

The action is for damages for breach of the covenant of title, and of the covenant for quiet enjoyment of the easement.

To take the covenant for quiet enjoyment first. To entitle the plaintiff to recover he must shew an interruption or obstruction of the easement. I apprehend it is not enough to say that were he to attempt to exercise it he would be obstructed, there must be an actual interruption or obstruction, equivalent to eviction in the case of a corporeal right. Now in the present case, the grant to Patterson conveyed a right, not capable of any other reasonable construction, to build a dam across the river at the eastern extremity of the land conveyed to him, *i. e.*, at or just below the head gates of the original head race. But the plaintiff has never endeavoured to do so. The dam he

built was much further up the stream and beyond the limits of the lands granted to Patterson. That was the dam that Attrill threw down, and it was for that alleged wrong that the action was brought against Attrill, and in which he was successful.

An interruption of such an easement would be a breach of the covenant for quiet enjoyment: *Pomfret v. Ricroft* 1 Saund, 322; *Andrews v. Paradise*, 8 Mod. 318; and it seems rather absurd to say that before the plaintiff can bring his action he must go to a heavy expenditure, with the certainty that he will not be allowed to enjoy the easement. But until he attempts to enjoy it, it cannot be said that he is interrupted. He had no right and no authority it seems to place his dam where he did. The defendants had not granted it to him, he erected it upon land belonging to Attrill on both sides of the stream, to whom also belonged the bed of the stream.

Upon this ground, I think the plaintiff's action must fail as to the covenant for quiet enjoyment.

As to the covenant for title, right to convey, &c., the Supreme Court, in *Platt v. Attrill*, 10 S. C. R. 425, has decided that the defendants not having in the grants made by them, under which Attrill claimed, made any reservation of the easement subsequently granted to Patterson that they had no right to grant that easement to him. The defendants were not parties to that decision and are therefore not bound by it, but it being a declaration of our highest Court of the construction of these very deeds, and of the law applicable to them, I consider myself bound by their decision. The covenant then was broken as soon as made, and the plaintiff would be entitled to such damages as accrued during the life of S. Platt.

The damages recoverable upon a breach of the covenant for title, have been considered in a number of cases in our courts, and are placed upon an intelligible footing. From a remark of the late Sir J. B. Robinson in *Clark v. Robertson*, 8 U. C. R. 370, 374, that the covenant of seisin can be but once broken, and but one remedy lies upon it, it may

be inferred that he had adopted the view of the American Courts, that it was not a continuous covenant, but in subsequent cases the English rule prevails, that it is a continuing covenant: *Graham v. Baker*, 10 C. P. 426.

In *Gibson v. Boulton*, 3 C. P. 407, it was held that in an action for breach of covenant for title and freedom from incumbrance, where the incumbrance was much larger than the value of the land, that the measure of damages is the purchase money and interest. To the same effect is *Graham v. Leslie*, 4 C. P. 176. In *Graham v. Baker*, 10 C. P. 426, an action for breach of covenant for title, Richards, J., says, "When there has been an eviction, or the plaintiff has never got into possession of the land, and in consequence of the want of title never can; the purchase money, and the interest, where there is no fraud, is the measure of damages under the covenants set out in the declaration." He also treats the covenant as a continuing one (p. 429) following *Kingdon v. Nottle*, 4 M. & S. 53. *Snider v. Snider*, 13 C. P. 157, and *Bannon v. Frank*, 14 C. P. 295, follow *Graham v. Baker*.

The rule so laid down is of comparatively simple application in case of eviction by superior title to the whole of the property, or of an incumbrance of greater value than the property. But where the defect of title applies only to part it may become somewhat more difficult. But the rule in such a case has been formulated by Gwynne, J., in *The Empire Gold Mining Co. v. Jones*, 19 C. P. 245, 257. "In case the contract has been executed, but no title has passed at all, then, on a covenant for seisin or good right to convey, he shall recover back his principal and interest, and expenses; but in case some estate has passed by the deed, but not the whole estate contracted for, then he is entitled to recover the difference in money between the value of that estate, which has passed, and that which the deed purported to convey, and which the grantor covenanted he had the right to convey."

That is exactly applicable to the present case. It is clear that the only object Patterson and Platt had in pur-

chasing the small piece of land was for the purpose of a mill site, and nearly the whole value consisted in the right to dam the water of the river to procure the necessary fall. The defendants had not the power to grant this easement, they had already conveyed Island C, The Great Meadow, and Block F, and by means of these conveyances the bed of the stream had also passed, and they had reserved no right of an easement such as granted to Patterson. There is an entire failure of title as to the easement, and the plaintiff has never got into possession of it, while at the same time the title to the land adjoining the stream has passed. The damages would therefore seem to be the difference between the value of the estate that has passed and that which the deed purported to convey, and the defendants covenanted they had the right to convey.

It was also contended for the defendants, that there having been no express grant of the covenants from Patterson to Tew, and from Tew to the plaintiff, the only covenants upon which a remedy could be had, would be those that run with the land, and the legal title to the land being outstanding in Tew, the plaintiff could not recover. But I think that the Judicature Act enabling the mortgagor to sue, as I have before stated disposes of this objection. And besides the breach of the covenant having taken place as soon as made the right to sue passes with the land.

There remains to be considered the arbitration between S. Platt and The Public Works Department on account of the breakwater built at the mouth of the river, the money awarded and paid, and its effect upon this action.

The questions submitted to the arbitrators were classed under two heads—1st. Damages to claimants property on account of the penning or damming up of the waters of the Maitland river by the construction of the breakwater and forcing of them back on suppliants (claimants) property. 2nd. Damages to claimants property by reason of the cutting off by the construction of the breakwater referred to, of the claimants right of way along the lands of the Buffalo and Lake Huron Railway, from his mill to the harbour at Goderich.

The arbitrators by their award, made on the 24th July, 1882, awarded to S. Platt, \$20,510, without interest for and in full settlement of all damages, of whatever nature and kind, for the past, present, and future, sustained or to be sustained by the said claimant by reason of the premises (*i. e.* the foregoing heads of damages), and that such sum be paid to him upon a proper release in that behalf being executed.

It is only the first head that can in any way affect the present action, if at all. It will be noticed that the damages are awarded in one block for both heads of claim, and it has not been shewn how much was allotted for the one class and how much for the other.

Much reliance was placed by the defendants upon this award, and upon the statements in the petitions of S. Platt in 1877, and his evidence given before the arbitrators in November, 1881. And he does represent in the petition, that the water and ice penned back by the breakwater would materially damage and wear away his land, and damage and destroy any buildings erected thereon, and the banks of any mill races or ponds constructed thereon, and his dam in the said river, and would render it impossible to use the lands for the purpose of milling and salt manufacture, and he would be compelled to abandon the lands for the purposes for which he purchased them. That by reason of the breakwater, in two winters the water and ice had been driven on and over the banks of the mill-race, very much breaking and injuring the same, and causing him much damage. That the backing of the water put out the fire in the furnace of his salt manufactory, and prevented the water power of his mill from working.

In his evidence Platt says, he paid for the land \$5,000, and had spent \$25,000 on it to make the water power sufficient. The bar at the mouth of the river caused by the breakwater varies from two to four feet. Since the construction of the breakwater, he had on an average five feet head of water, and his power is reduced about one-half, and it is not worth more than one-half of the value it had

before the construction of the new breakwater. He had been prevented from running the saw mill since 1876, by reason of the obstructions complained of. Since this obstruction he could not run his saw mill more, on an average, than thirty days in the year.

When the petition was filed the dam of Platt up the stream had not been interfered with. It was not broken down by Attrill till February, 1880, and in April, 1880, judgment was given in Platt's favour, in the suit of *Platt v. Attrill*, which was appealed from, and judgment in the Court of Appeal was given on 29th June, 1882, and in the Supreme Court, on 5th January, 1884. So that at the time of these proceedings for arbitration, Platt had an apparent mill site, the right to which had been affirmed by the court of first instance, but was questioned in appeal, which appeal ultimately turned out to be successful. That may account for the way in which his evidence was given. But as it turns out he had no mill site, no right to any head of water: there was no ground on which he had a right to damages for its destruction, and it does not appear in fact any damages were given for that, or, if any, what amount.

But assuming that the defendants can claim the benefit of the obstruction by the breakwater, it only amounts to three feet—leaving a fall of five feet—which Platt lost by the want of title in the defendants. Five feet head is not as valuable as eight feet head, but it is of some value, the amount of which can only be ascertained by a reference.

Whether the defendants can reduce the damages payable for breach of covenant by deducting the amount, or a portion of the amount, received from the Government, does not seem to be a question of easy solution. The injury caused by the erection of the breakwater cannot be looked upon as a tort. It was erected by the Public Works Department in pursuance of lawful authority, and the liability to indemnify the plaintiff for the injury arose out of the statute authorizing arbitration. It would appear to be rather a statutory contract by which the Government was

to indemnify the plaintiff for injury caused by the construction of the work. The liability of the defendants also does not arise from a tort but from a covenant which they have not fulfilled. The subjects of the arbitration and of the action of covenant are not the same. The arbitration was for backing water to the depth of three feet, the action of covenant is for not giving a head of eight feet of water. It may be that the arbitration has prevented the plaintiff from ever having a head of eight feet, even if the defendants had fulfilled their covenant. But the defendants' agreement to give eight feet has not been complied with, and why should they be relieved from their liability because the plaintiff may have recovered from others damages for an act that impairs indeed the usefulness of his property, but does not entirely destroy it. The case of *Windsor and Annapolis R. W. Co. v. The Queen*, 10 S. C. R. 335, does not determine this question. The Judges who expressed an opinion were equally divided; but those who were adverse to the right of the suppliants place it upon the ground that the damages against the Western Counties Railway for a tort, were for the same moneys they were asking from the Crown. As at present advised, I do not think the defendants entitled to set off the money recovered from the Government, even if any part of it were for the back water, against their liability for damages for their breach of contract.

It was also argued for the defendants that if the dam had been erected it would have diverted water from Block A, the title to which was not derived from the defendants, and that the plaintiff could not have erected the dam without subjecting himself to an action by the owner of Block A. That might be so, but that was for the plaintiff to consider; and it might perhaps be found from the operations of the breakwater, that the water was not diminished along the water line of Block A, and if not, it was still in his power to agree with the owner of Block A. It is not a matter that the defendants can take advantage of.

It was also urged that the dam could not be built at the

place intended by the grant to Patterson. The evidence does not bear this out. The surveyors say it was only a question of expense, nothing impossible about it. The covenant cannot be construed as only a license by the defendants to the plaintiff to do an impossible act.

Another argument for the defendants was that the conveyances by the defendants to the purchasers prior to Patterson being registered, were notice to the plaintiff, and that he was bound by their effect and could not sue for a breach of the covenant which he thus knew or must be taken to have known that the defendants had no power to fulfil. Assuming that he had notice, and of the legal effect of these instruments. Was the plaintiff to assume that the defendants would not take measures to fulfil their engagement? Is it not rather to be presumed that such was their intention, and the covenant was taken to secure their fulfilment of it? Thus in case of a sale where there are known incumbrances of any kind subject to which the purchaser agrees to take the property, they ought to be specially and expressly excepted from the operation of the covenant against incumbrances. They should be excepted, Mr. *Rawle*, says, p. 116, 4th ed., for the protection of *the vendor*, for if not so excepted, the fact of their being known to the purchaser will, according to the weight of authority, be no bar to his recovery upon the covenant. In *Hubbard v. Norton*, 10 Conn. 422, referred to in note 2, at p. 117, *Rawle's* 4th ed., it is said, "How can the plaintiffs knowledge destroy the effect of the defendants' covenant? Suppose the defendant had sold a farm which he and the purchaser both knew the seller did not own, could that knowledge destroy or affect the nature of the covenant for seisin." And *Duncan, J.*, in *Funk v. Voneida*, 11 Serg. & Rawle. (Penn.) 112, says, "The rule as to the vendee is *caveat emptor*, so let the vendor take care of the covenants he enters into." Mr. *Dart*, *Vendors and Purchasers*, 4th ed., 719, says, it seems doubtful whether covenants for title would be held to extend to a defect known to the purchaser at the time of their being entered into, and refers to a suggestion in *Sugden's Vendors and Pur-*

chasers, 573, as to how the doubt might be avoided. Mr. Rawle has considered the suggestion of Sugden, and of Mr. Butler, but considers the weight of authority against them.

In support of an argument that the plaintiff could only get nominal damages, I was referred to *Child v. Stenning*, 11 Ch. D. 82, but that seems to me rather in favour of the plaintiff. It was an action upon a covenant for quiet enjoyment. There had been no eviction. If there had been eviction so that there could be no other action for quiet enjoyment, the damages must be assessed once for all, but where there was no eviction, the damages are only those actually sustained. Apply that to this action on the covenant for title, where no title to the easement has passed, and plaintiff never was and never can be in possession of it, the damages must be assessed once for all, so far as the easement is concerned.

If I have not noticed all the arguments used before me, I have at least noticed all those that seemed material, and the conclusion I have come to is, that the plaintiff is entitled to damages for breach of the covenant for title, and there will be a reference to the Master at Goderich to ascertain them. The plaintiff is entitled to costs to the hearing, as also of the motion to discharge the order of revivor, and of leave to add defence. The costs of the reference will follow the result.

The defendants are entitled to deduct so much of their costs as were caused by the claim for damages on the covenant for quiet enjoyment.

G. A. B.

[CHANCERY DIVISION.]

FOSTER V. RUSSELL ET AL.

Contract—Specific performance—Uncertainty—Collateral security.

The plaintiff, a bookkeeper and accountant, entered into the following agreement with the firm of R. & Co. in the form of a letter addressed to himself: "In consideration of you advancing us the sum of \$3,000, we agree to give you collateral security, and to pay you interest on the same at the rate of eight per cent. per annum." The plaintiff advanced money for the benefit of the firm of R. & Co., but before he had received any security the firm made an assignment for the benefit of creditors.

The plaintiff now sought to have it declared that he had a lien on the assets and effects of the firm, real and personal, and to have them assigned to him.

Held, that the agreement was incapable of specific performance by the court, for the reason that the terms were too vague and uncertain to be entertained. No kind of security was specified in the agreement, and parol evidence could not be given to supply the deficiency. The plaintiff was, however, entitled to have judgment at law against the firm of R. & Co. for the \$1,900 and interest and costs of action.

DeGear v. Smith, 11 Grant, 570, followed.

THIS was an action brought by William Foster against John Russell and John W. Russell, manufacturing under the name and style of John Russell & Co., and one William Ewart, claiming a declaration that a certain sum of \$1,900 and interest was payable to him, and that he had a lien on the assets and effects of the defendants to the extent of certain advances made by him, and interest and costs of suit. That the defendants might be ordered to assign to him sufficient of such assets and secure him his said advances and interest and costs of suit, and further relief. The writ in the action was issued on February 25th, 1886. The facts of the case are stated in the judgment.

The action was tried on May 4th, 1884, at Woodstock, before Proudfoot, J.

C. Moss, Q. C., and *Walsh*, for the plaintiff. There is no question but that the plaintiff's money went into the business. The defence does not deny the authority of McKellar. The circumstances show the nature of the security intended, viz., customers' notes. An account of notes in the

assignee's hands should be taken. In any event a judgment should go for the amount against the Russells.

W. Cassels, Q. C. A judgment against the Russells would be of no benefit. The plaintiff would have to come in before the assignee. As to the agreement, it is only a general agreement to give collateral security, and cannot be enforced. It cannot be controlled by outside evidence : *DeGear v. Smith*, 11 Gr. 570 ; *Fry* on Spec. Perf., 2nd ed., s. 33 ; *Twynan v. Hudson*, 4 DeG. F. & J. 462.

Moss, in reply, referred to *Waterman* on Spec. Perf. s. 20, N. 6.

June 16th, 1886, PROUDFOOT, J.—The plaintiff is a bookkeeper and accountant, the defendants, the Russells, were workers of an iron foundry in Ingersoll, and the defendant Ewart is their assignee under an assignment made on the 18th March, 1886, under the provisions of the act respecting assignments for the benefit of creditors, Statutes of Ontario, 1885, c. 26.

In December, 1885, the defendants caused an advertisement to be published in the *Mail* newspaper for a good book-keeper or a partner with a small capital ; the plaintiff answered it, and soon after McKellar, who was then a partner with the Russells, called upon the plaintiff and asked him to come to Ingersoll, and see the state of affairs. The plaintiff was shown over the establishment by McKellar. Finally an agreement was come to and drawn in shape of a letter as follows :—

INGERSOLL, 29th Dec., 1885.

WILLIAM FOSTER, ESQ., Toronto.

"DEAR SIR,—In consideration of your advancing us the sum of \$3,000, we agree to give you collateral security, and to pay you interest on same at rate of eight per cent. per annum. We will also be happy to have you on our office staff, and to pay you a salary of \$600 per annum. This is with a view of your entering into partnership with us, should all things be to your satisfaction.

Yours truly,

JOHN RUSSELL & Co."

Both McKellar and the plaintiff swear that the kind of security was talked of, that it was to be of the same kind as the firm gave the Bank, customers' notes; and I believe they speak the truth.

The plaintiff advanced \$1,900, which was used for the benefit of the firm. Then the firm made an assignment. The plaintiff has never received any security. He now seeks to have it declared that he has a lien on the assets and effects of the firm, real and personal, and to have them assigned to him.

The defendants the Russells put in a number of defences, all of of which, so far as consisting of matters of fact, I find to be untrue; and the defendant Ewart adopts the defence of the Russells.

But the defendants submit also that if the agreement was made, which they deny, that it is incapable of specific performance by this court for the reason that the terms are too vague and uncertain to be entertained. And, very unwillingly, I feel bound to give effect to this objection.

No kind of security is specified in the agreement. And I do not think parol evidence can be given to supply the defect. If there is any ambiguity it is a patent one. The claim does not allege that the plaintiff was to have customers' notes, if that would have done any good; and claims a lien on all the assets, real and personal, of the firm.

DeGear v. Smith, 11 Gr. 570, shows that there can be no specific performance of such an agreement. But it also shows that there would be a right to have judgment at law; which under the present system may be had in this Division of the High Court.

I shall therefore enter judgment for the plaintiff against the Russells for the \$1,900 and interest, and costs of this action. I dismiss the action against Ewart, without costs, as he has adopted the defence of the Russells, which on all questions of fact is disproved.

The action was begun on the 25th February, 1886, and the assignment to the defendant Ewart was not made till the 18th March following.

[CHANCERY DIVISION.]

GEMMILL V. GARLAND.

Copyright—Notice of entry—38 Vic. c. 88, secs. 9, 17, (D.)—Variation from statutory form—Stating in book that it is copyright before copyright actually obtained.

G., the writer of a book, printed the book which he intended to copyright with notice therein of copyright having been secured, although he had not at the time actually taken the steps to obtain copyright. He, however, did this merely in anticipation of applying for copyright, which he subsequently applied for and obtained. Furthermore, it appeared to be sanctioned by the practice at the office at Ottawa, and there was no publication of the book till after the statutory title of the author was complete.

Held, that this did not invalidate the patent, and *quære* whether it was an infringement of sec. 17 of the Act respecting copyrights, 38 Vic. ch. 88 (D.), so as to subject G. to any penalty.

On the title page of the book as published the plaintiff caused these words to be printed: "Entered, according to Act of Parliament, in the year 1883, by J. A. Gemmill, in the office of the Minister of Agriculture, at Ottawa."

Held, that this was a sufficient compliance with sec. 9 of the said Act, although the form of words used was not exactly the same as there prescribed, inasmuch as the words "of Canada," omitted after the word "Parliament," were immaterial. General remarks on forms prescribed in various cases by Acts of Parliament.

THIS was an action brought by John Alexander Gemmill against Nicholas Surrey Garland, claiming amongst other things an injunction to restrain him from printing, publishing, and selling a book known as "The Parliamentary Directory and Statistical Guide, 1885," the same being alleged to be an infringement of the plaintiff's copyright in a book called "The Canadian Parliamentary Companion, 1883," or any book containing any portions or extracts taken or colorably altered from that or certain other books alleged to be copyrighted books of the plaintiff.

The facts of the case so far as is necessary to the understanding of the points decided, are stated in the judgment.

The action was tried on May 25th, 1886, at Ottawa, before Boyd, C.

W. Cassels, Q.C., and Walker, for the defendant, were first called on. The notice of entry does not conform to

38 Vic. c. 88 (D.), s. 9. Then in spite of s. 17 of that Act the book was published as now, before the copyright was obtained: *The Cornish Silver Mining Co. v. Bull*, 21 Gr. 592; *Coote v. Judd*, 23 Ch. D. 727; *Page v. Wisden*, 20 L. T. N. S. 435; *Pierce v. Worth*, 18 L. T. N. S. 710; *Mathieson v. Harrod*, L. R. 7 Eq. 270; *Low v. Routledge*, 33 L. J. Ch. 717; *Sarazin v. Hamel*, 32 Beav. 151; *Heywood v. Potter*, 1 E. & B. 439; *Colnaghi v. Ward*, 12 L. J. Q. B. 1; *Newton v. Cowie*, 2 Bing. 246; *Chicago Music Co. v. Butler Paper Co.*, 19 Fed. R. 758; *Merrell v. Tice*, 104 U. S. R. 557; *Boucicault v. Hart*, 13 Blatch. (C. C. U. S.) 47; *Parkinson v. Laselle*, 3 Sawyer, (C. C. U. S.) 330; *Lawrence v. Dana*, 4 Cliff. 1; *Baker v. Taylor*, 2 Blatch. (C. C. U. S.) 82; *Wheaton v. Peters*, 8 Peters, (S. C. U. C.) 591; 3 Cent. L. J. 443.

Christie, for the plaintiff. The cases cited are not on the same statute as ours, which differs from the English and United States Acts. We have a copyright, and a right to have it protected as property: *Drone on Copyright*, pp. 500-522; *Beckford v. Hood*, 7 T. R. 620; *Brown-Giles Lithographic Co. v. Sarony*, 111 U. S. R. 53, S. C. 18 Cent. L. J. 349. We may be exposed to penalty under 38 Vict. ch. 88, (D.) sec. 17, but do not lose copyright by first printing the issue. See *Slater on Copyright*, p. 6.

Cassels, in reply. *Beckford v. Hood*, 7 T. R. 620, is over-ruled by *Newton v. Cowie*, 2 Bing. 246; *Burrows-Giles Lithographic Co. v. Sarony*, 111 U. S. R. 53, has no application.

June 12th, 1886. BOYD, C.—After the best consideration which I can give to this case, my conclusion is, that the plaintiff is entitled to an injunction to protect his copyright against the invasion of the defendant. The plaintiff is entitled, in my judgment, to rest upon his edition of the "Canadian Parliamentary Companion" of 1883, of which he is the compiler, and which I find that he has duly copyrighted. This book is made up of old matter extracted from former editions of 1874 and 1881, and in great part

of new matter collected and arranged by the plaintiff, giving information as to Senators, Members of Parliament, and prominent officials, who first appeared in public life since the edition of 1881. At the trial I compared this new matter in many different places with the defendant's compilation, called "The Parliamentary Directory and Statistical Guide" of 1885, and found as a fact that there was in the latter a literal transcription by wholesale of long passages from the former, which entitled the plaintiff to an injunction if he had a title to the copyright of his book. Two points of law were made against his title: First, that section 17 of the Copyright Act has been violated by the plaintiff. I am against this objection as fatal. It may be a matter of penalty, but I do not think it would be even that considering what was done. The plaintiff appears to have had printed the book which he was going to copyright, with notice thereon of copyright having been secured, before he had actually taken the requisite steps to obtain a copyright. This, however, was merely in anticipation of applying for and obtaining it. It saved expense, it was sanctioned by the practice of the office at Ottawa, and there was no publication of the book till after his statutory title was complete.

Second, it is said that section 9 of the Act has not been complied with. That is as follows: "No person shall be entitled to the benefit of this Act, unless he gives information of the copyright being secured, by causing to be inserted in the several copies of every edition published during the term secured, on the title page or the page immediately following, if it be a book * * the following words that is to say: "Entered according to Act of Parliament of Canada, in the year —, by A. B., in the office of the Minister of Agriculture." 38 Vic. ch. 58, (D.) In the plaintiff's edition of 1883, this notice appears in the proper place and in these words: "Entered according to the Act of Parliament, in the year one thousand eight hundred and eighty-three, by J. A. Gemmill, in the office of the Minister of Agriculture at Ottawa." The objection is, that it

does not follow the form of the statute, because the words "of Canada," are omitted after "Parliament."

Now it is to be observed that the form of words given has no magical effect like the "Open Sesame" of the Arabian tale, no symbolical operation like the phrases used in the Act relating to short forms of conveyances and mortgages. The object of the provision is plain, and lies on the face of the section, viz, to give notice of copyright, so that none of the public may copy the work in ignorance of the author's rights. It is also to be observed that a literal adherence to the form is not peremptorily prescribed, because the blank for the year has to be filled up according to the fact, and the letters "A. B." have to be exchanged for the name of the applicant. It is also clear that there is nothing misleading in the notice of entry as it stands—no fact wrongly stated,—no omission of any information that is material. It is common knowledge that only the Parliament of Canada can legislate with reference to copyright to be registered in the office of the Minister of Agriculture at Ottawa. The omission of the words, "of Canada," is, therefore, in my opinion, immaterial, because they are, if not surplusage, at least of such minute significance in this connection that the law will not notice the variance. The meaning of the form of words given in the book is substantially and effectively, if not literally and formally, the same as that found in the statute. That being so, I think the principles enunciated in the advice given by Mr. Justice Crowder on behalf of the judges to the House of Lords in the case of *Earl of Mountcashell v. Viscount O'Neil*, 5 H. L. Cas. 937, are pertinent to this case, and to the effect that forms, though literally prescribed by the Legislature, may be varied according to reason and common sense, so long as the material matters provided for are correctly given. To the like effect is the judgment of a majority of the judges in the very recent case of *Ex parte Stanford, in re Barber*, 34 W. R. 507 (April, 1886.)

I may refer to some kindred cases which support my conclusions to a greater or lesser extent. In *Thorpe v.*

Browne, L. R. 2 H. L. 220, the question was, as to whether the statute was complied with which in the registration of judgments to form a charge on land requires the description of the name and place of abode of the debtor to be given. Lord Chelmsford, L. C., said at p. 232; We have to look to what the object and intention of the Legislature were in requiring that there should be these particulars. * * It was clearly for the purpose of identification. It was not that there should be an exact description of the very place where he was residing, so that any person might resort to him there, and ascertain particulars. It was for the purpose of distinguishing him from all other persons, and leaving no doubt whatever as to the identity of the person against whom the judgment which was to be charged upon the lands had been obtained. Lord Colonsay said, at p. 236: "I am very decidedly of opinion that when a statute requires a particular thing to be done * * it is necessary that the statute should be complied with in the way that is there pointed out, and that equivalents cannot be accepted. But there is a great difference between the entire omission of the statement and the question whether the statement is sufficient for the accomplishment of the purpose of the statute. Omission of statement, or error of statement, is very different from vagueness of statement."

The same question as to registration of judgments arose in *Davies v. Kennedy*. Ir. R. 3 Eq. 31, and the Master of the Rolls said, at p. 69, following the line of Lord Colonsay's observations: "When a statute like this directs certain matters to be stated in a document, although the Court may be satisfied that the object for which any particular statement is required might be equally well attained in some other way, it cannot speculate on that, or inquire into the object intended, with any view of allowing an equivalent. But it may and ought to inquire into the object intended with another view, viz., to ascertain whether what is stated is or is not what the Act requires." He says again, at p. 69: "The tendency of the more recent

decisions is to discourage subtle criticisms and trifling objections, which found more favour in early discussions than they would now receive." In *Re Hewer, ex parte Kaken*, L. R. 21 Ch. D. 871, the question arose whether the statute as to Bills of Sale which requires that a "true copy" of the instrument should be registered, had been complied with. An omission was made of the words "*on the third day of each month*" in the clause as to the manner of payment. Bacon, C. J., said, at p. 875, over-ruling the objection: "In what respect is it an untrue copy? A true copy does not necessarily mean an exact copy. * * The Act does not require it to be an absolutely exact copy, but that it shall be so true that nobody reading it can by any possibility misunderstand it." "This," he goes on to say, at p. 876, "is in my opinion a sufficiently true copy, and nobody can say that there is anything false in the copy, and it cannot mislead any one who reads it."

The provisions of our statute as to notice of entry are taken from United States legislation, and one would naturally desire that the construction given to this and kindred clauses by our courts should not be at variance with the judicial construction put upon the Act of Congress. While the earlier authorities cited by Mr. Cassels indicate that a punctual adherence to form is requisite, no case goes so far as to support his present contention. The later decisions are in accord with the views which I have taken of this case. In the comparatively old case (1848) of *Baker v. Taylor*, 2 Blatch. (C. C. U. S.) 82, it was held that the insertion of the wrong year (1847 for 1846) in the notice of entry was a fatal objection to the copyright, whereas in the decision of 1881, in *Myers v. Callaghan*, 10 Bissel. (C. C. U. S.) 139, a like mistake in the notice (1866 for 1867) was deemed unimportant. This decision goes much beyond what it is necessary to hold in order to support the plaintiff's copyright, because that was an error in what seems to me an important particular and one which might have a tendency to mislead. It was, however, approved of as laying down the correct principle in cases of slight error by a very

eminent Judge (Blatchford) in *Donnelley v. Ivers*, 20 Blatch. (C. C. U. S.) 381.

In *Myers v. Callaghan*, 10 Bissell (C. C. U. S.), Drummond, J., uses language at p. 146 which I desire to quote and to adopt as pertinent to the case of the plaintiff: "In *Wheaton v. Peters*, 8 Peters 991, the Supreme Court decided there must be a strict compliance with the provisions of law. I do not understand that the court has laid down the rule with such unbending rigor as seems to be implied in *Baker v. Taylor*, 2 Blatchf. (C. C. U. S.) 82. Undoubtedly a majority of the court in the case of *Wheaton v. Peters* held that the law must be complied with, but they do not say that if there shall be a slip in any trifling particular, therefore the author is deprived of all right to the product of his brain and of his hand. Conceding that it is a right which must exist under the law, the question is, whether, if that is substantially and in good faith complied with, it is not sufficient? It seems to me that it is. * * * I am not inclined to agree with the strict construction which has been placed on the Acts of Congress by some of the Courts. It seems to me on the contrary, that these various provisions should have a liberal construction in order to give effect to what may be considered the inherent right of the author to his own work." An English authority going in the same direction as *Myers v. Callaghan*, is *Lover v. Davidson*, 1 C. B. N. S. 182.

I have not overlooked the provisions in the 20th section of the Act 38 Vict. ch. 88, (D.,) relating to *clerical errors* in any instrument drawn in the office of the Minister being curable, which may reflect disastrously upon errors in papers prepared by the applicants. But this does not necessarily follow, for clerical errors may be in material as well as immaterial facts, and may be important or unimportant.

Inhibiting the use by the defendant of the parts first published in the plaintiff's edition of 1883, will so substantially interfere with the whole of the defendant's

publication of 1885, that it is not necessary to prosecute the inquiry further as to whether there is copyright in the parts of the plaintiff's book which were published in the editions of 1874 and 1881. That would raise a somewhat nice as well as difficult question which has not been presented in the pleadings, or adverted to in the argument, involving the construction and effect of the 9th and 26th sections of the present Act and parts of the earlier statutes.

Judgment will be for the plaintiff, limited to an injunction (as he waived other remedies at the hearing), with costs.

A. H. F. L.

[CHANCERY DIVISION.]

WOOD v. ARMOUR.

Will—Construction—Intestacy—Blended fund—Distribution per capita.

A testator by his will directed his executors to pay his debts, funeral expenses and legacies thereafter given out of his estate, and proceeded: "My executors are hereby ordered to sell all my real estate, after the payment of all my just debts and funeral expenses, and all my property and personal effects, money, or chattels are to be equally divided between my children and their heirs, that is, the heirs of my son G. and daughter E., now deceased; and my son J., Mary and Hannah, or their heirs. Should any of my said heirs not be of age at my death, my executors are to place their legacies in some of the banks of Ontario until the said heirs are of age."

Held, (1) That there was no intestacy either of the real or personal estate. It is to be presumed that the testator did not intend to die intestate, and the language showed he did not intend his heirs to take his property as real estate, as he peremptorily directed a sale, making an actual conversion of it into money, thus blending the real and personal property into a common fund, and then bequeathed it all to the legatees.

- (2) That the persons entitled to share under the will took *per capita* and not *per stirpes* upon the same principle as in the case of *Abrey v. Newman*, 16 Beav. 431.
- (3) That [the grandchild of G. was not entitled to a share, the children of G. taking in their own right and not in a representative capacity.

THIS was a motion by way of appeal from the rulings of the master at London in this matter with reference to the will of Nathaniel Wood, on the ground that the

master should have found that there was an intestacy as to the realty.

2. That if his finding that the testator died intestate as to all his property was right, he should have found that the shares of the deceased testator in the blended fund of realty and personalty went to their heirs at law and not to their next of kin.

3. That he should have found that the persons entitled to share under the will took *per stirpes* and not *per capita*.

The original order containing the reference to the master was dated December 21st, 1885, and was the usual order for administration under G. O. 638. In the course of the proceedings under the reference, it became necessary to construe the said will of Nathaniel Wood, and by his certificate dated May 26th, 1886, the master certified with regard to the will, that he found that the testator did not die intestate with respect to any part of his estate, real or personal, and that the whole of his estate was disposed of by his will in the manner following: in the first place, having appointed certain persons to be executors of his will, the testator directed his executors to pay his just debts, funeral expenses, and the legacies in his will given out of his estate, and immediately following the last foregoing directions there followed in the will these words: "My executors are hereby ordered to sell all my real estate after the payment of my just debts and funeral expenses, and all my property and personal effects, money, or chattels are to be equally divided between my children or their heirs, that is, the heirs of my son Gilbert and daughter Sarah, now deceased, and my son John, Mary Jane and Hannah, or their heirs. Should any of my said heirs not be of age at my death my executors are to place their legacies in some of the banks of Ontario, until the said heirs are of age."

The master then proceeded to find who were the parties entitled to share in the real and personal estate of the testator under his will, and that they took *per capita* and not *per stirpes*.

The appeal was heard on May 31st, 1886, before Proudfoot, J.

W. R. Meredith, Q.C., for the plaintiff, and two of the defendants, who were children of the testator. As to there being an intestacy as to the realty: *Maugham v. Mason*, 1 V. & B. 410; *Hawkins* on Wills, 2nd Am. ed. 46. If the will operates then the property went to the heirs and not to the next of kin: *DeBeauvoir v. De Beauvoir*, 3 H. L. C. 524; *Southgate v. Clinch*, 27 L. J. Ch. N. S. 641; *Hawkins* on Wills, 2nd Am ed, p. 92. As to the devolution under the will it should be *per stirpes*: *Abrey v. Newman*, 16 Bea. 431; *Arrow v. Mellish*, 1 DeG. & Sm. 355; *Cosgrove v. Palmer*, 16 Beav. 435; *Turner v. Whittaker*, 23 Beav. 196; *Anderson v. Bell*, 29 Gr. 452, 8 A. R. 531. The intention to be gathered from the will is to provide for his children by their families: *Wingfield v. Wingfield*, 9 Ch. D. 658; *In re Philp's Will*, L. R. 7 Eq. 151; *In re Sibley's Trusts*, 5 Ch. D. 494. Where "heirs" is used, distribution must be *per stirpes*: *Taylor v. Connor*, 7 Ind. R. 115; *Roome v. Counter*, 1 Halstead (N. J.), 111; *Fisset's Appeal*, 27 Penn. St. 55; *Risk's Appeal*, 52 Penn. St. 269; *Balcom v. Haynes*, 14 Allen (Mass.) 204; *Bassett v. Granger*, 100 Mass. 348; *Holbrook v. Harrington*, 16 Gray (Mass.) 102.

R. M. Meredith, for the executor and two grandchildren. There is no intestacy; on the construction of the whole will the converted property passed to the residuary devise. The bequest is divisible *per capita*: *Williams* on Executors, 8th ed., pp. 1519, 1520, *n* (q), *ib.* 120 *n* (q), and cases cited. Here the testator uses "heirs" as synonymous with "children," and the cases in the American Courts are not based on any English authority: *In re Campbell's Trusts*, 31 Ch. D., is distinguishable. See, also, *Izod v. Izod*, 32 Beav. 242; *Theobald* on Wills, 2nd ed., p. 252. The word "equally" must have the same effect given to it throughout. "Or" must mean "and." The only doubt is, whether the great grandchild can take.

Harcourt, for a grandchild and great grandchild of the testator, who were infants. The testator plainly did not intend to die intestate: *Jarman on Wills*, 4th ed., vol. 1, p. 721-8; *ib.* p. 484; *ib.* vol. 2, p. 83; *Williams on Executors*, 8th ed., pp. 113-4. The word "heirs" is used in its ordinary sense when realty and personalty are blended: *Chadbowine v. Chadbowine*, 9 P. R. 317. If all children are living at the time of the will they take *per capita*: *Jarman on Wills*, 4th ed., vol. 1, p. 515; *Hawkins on Wills*, 2nd Am. ed., p. 246; *Longmore v. Brown*, 7 Ves. 124; *Theobald on Wills*, 2nd ed., pp. 253-255. There is no appeal as to the great grandchild.

Meredith, in reply, referred to *Renny v. Turner*, 2 Phill. 493; *Theobald on Wills*, 2nd ed., pp. 252-5.

June 16th, 1886. PROUDFOOT, J.—Nathaniel Wood made his will on the 22nd day of August, 1877, by which he appointed executors, and in very terse terms directed them to "pay all my just debts, funeral expenses, and the legacies hereinafter given out of my estate. My executors are hereby ordered to sell all my real estate after the payment of my just debts and funeral expenses, and all my property of personal effects, money, or chattels are to be equally divided between my children or their heirs, that is the heirs of my son Gilbert and daughter Sarah, now deceased, and my son John, Mary Jane and Hannah, or their heirs. Should any of my said heirs not be of age at my death my executors are to place their legacies in some of the banks of Ontario until the said heirs are of age." That is the whole will.

It was contended that there was an intestacy as to the real estate directed to be sold. But this I think is untenable. The executors are to pay his debts, funeral expenses, and legacies out of his estate. The legacies are thus charged on the lands. The only legacies mentioned are given to his children or their heirs, that is, to persons who would have been his heirs in case of intestacy. It is to be presumed that the testator did not intend to die intes-

tate—and the language shows he did not intend his heirs to take his property as real estate—as he peremptorily directs a sale, makes an actual conversion of it into money, thus blending the real and personal property into a common fund, and then bequeaths it all to the legatees. In *Maugham v. Mason*, 1 V. & B. 410, the realty directed to be converted, and the personalty were the subject of separate gifts, and treated as distinct funds, differing in these respects from the present. There is no residuary clause in the technical sense of the term, but the single clause of gift seems to be, in its nature, residuary. And it has been repeatedly held that the intention that the proceeds of the sale of real estate should pass under a residuary bequest of personal estate, may be inferred from expressions in the will irresistibly leading to such a conclusion, and the blending of the real with the personal estate has been considered as furnishing an indication of such intention: *Byam v. Munton*, 1 Russ. & My. 503, and cases cited in *White & Tudor's* notes to *Ackroyd v. Smithson*, 5th ed., vol. 1, 949. So in the present case the land is converted into money, and then the testator gives all the blended fund of personal effects, money or chattels, to the legatees.

The question was also discussed at some length whether the property was divisible *per capita* or *per stirpes*, and much stress was laid upon the use of the word *heirs* as indicating an intention that the division was to be *per stirpes*. But I think that the testator has explained the sense in which he uses the word, viz., children. He bequeaths to his children or their heirs, that is the heirs of his deceased son Gilbert, and of his deceased daughter Sarah, and his living son and daughters, or their heirs, and should any of his said heirs not be of age at his death, their legacies were to be put in a bank, &c. These persons whom he thus recognized as heirs were to be such as might not be of age at his death, and must therefore mean his own children or the children of deceased children.

This does not determine that they are to take *per capit a*. For the gift to the children may be substitutional. But here I think it is not so. The children of the deceased son and daughter take in their own right. The division is to be equally made between the children of his deceased son and daughter, and his living son and daughters. I am unable to distinguish this in principle from *Abrey v. Newman*, 16 Beaſ. 431. The question there arose upon a bequest to be "equally divided between Benjamin James and his wife Ann James, and Charles Abrey and his wife, for the period of their natural lives, after which, to be equally divided between their children, (that is to say) the children of Benjamin James and Charles Abrey, above named." The Master of the Rolls distinguishes the case of *Arrow v. Mellish*, 1 DeG. & Sm. 355, where a gift was to the testator's wife for life, and at her death to his three nieces, and to Mary Arrow, to be by them equally divided, share and share alike, and at their deaths to go equally, share and share alike, to their children, and Lord Justice Knight Bruce held that *their children* meant *their respective children*, and divided the fund *per stirpes*. The Master of the Rolls says, here it would not be possible to read the words *respective children*, inasmuch as the testator, as if purposely to exclude that construction, has added the words, "that is to say, the children of *Benjamin James* and *Charles Abrey*."

In the present case the testator has not given an estate for life, but he indicates who are to be the legatees as specifically as in *Abrey v. Newman*. That is to say, the children of his deceased son and daughter, and his living son and daughters, among whom the fund is to be equally divided.

In *Jarman on Wills*, 5th Am. ed., vol. 2, p. 756, it is said that where a gift is to the children of several persons they take *per capita* and not *per stirpes*. The same rule applies where a devise or bequest is made to a person and the children of another person, or to a person described as standing in a certain relation to the testator, and the children

of another person standing in the same relation, as to "my son A and the children of my son B," in which case A takes only a share equal to that of one of the children of B, though it may be conjectured that the testator had a distribution according to the statute in his view. In the note of the American editors on p. 761, many cases are cited of American decisions to the same purport. Thus in *Stokes v. Tilly*, 1 Stockt. 130, the gift was "to be equally divided between the children of my nephew A and my sister B, each one to have an equal share thereof, and his children—the children of my deceased nephew C, to take their equal share therein with my sister B and the children of A;" the division was to be made *per capita*. In *Bender's Appeal*, 3 Grant's Cases 210, Lewis, C. J., says: "The words 'equally to be divided' when used in a will mean a devise *per capita* and not *per stirpes*, whether the devisees be children and grandchildren, brothers and sisters, and nephews and nieces, or strangers in blood to the testator. But where the will is silent in respect to the manner in which the legatees are to take, if the next of kin of the person described be not related to the testator in equal degree, those most remote can only claim *per stirpes*." In *Peale's Estate*, 32 Leg. Int. (Pa.) 374, a bequest to A and the children of B, share and share alike is divisible *per capita*.

Theobald on Wills, 2nd ed., 252. states the law in the same way.

A number of American cases were cited by Mr. Meredith arguing for a stirpital division, which I think are all to be found in the same volume of *Jarman*, pp. 92, 619, 620, and appear to be there cited to shew the effect of a devise to "heirs." In the present case I think the word is not used in its technical sense, and therefore that these cases are not applicable.

Another question was, whether a grandchild of the deceased son Gilbert, a great grandchild of the testator, was entitled to a share. And I think he is not. The children of Gilbert take in their own right, and not in a

representative capacity. And in the *Earl of Orford v. Churchill*, 3 V. & B. 59, it was held that grandchildren did not include great-grandchildren. In the present case the word grandchildren is not used, but the heirs (or children) of Gilbert, *i. e.* the grandchildren of the testator are mentioned as direct objects of the gift.

Costs out of estate.

A. H. F. L.

[CHANCERY DIVISION.]

RE TRENT VALLEY CANAL AND LANDS EXPROPRIATED AT
FENELON FALLS.

*Patent—Metes and bounds—Conveyance—Waters—Acreage—Medium
filum aquæ.*

A patent from the Crown purported to grant the W. $\frac{1}{2}$ of a certain lot of land, through which flowed the F. river, issuing out of the C. lake in the N. W. corner of the half lot, and running across the half lot in a diagonal direction. In the metes and bounds given in the patent occurred the following courses: "Then S. 73 degrees 15 minutes W. 24 chains, more or less, to C. lake; thence southerly, along the water's edge, to the allowance for the road between the 9th and 10th concessions; thence S. 16 degrees 45 minutes E. 21 chains, more or less, to the place of beginning: containing 76 acres, more or less, together with the waters thereon lying and being."

From the point thus indicated on the margin of the C. lake, which was about the place of issuance of the F. river from it, a shoal, a good part of which was exposed, extended across in a southerly direction to the road between the 9th and 10th concessions. It was contended that the said metes and bounds indicated that a course was to be taken from the said point on the margin of the C. lake along the E. bank of the river to the imaginary eastern boundary line of the half lot, then across the river, and up the other side to the said road, and that this interpretation coincided with the acreage mentioned in the patent, and that none of the land covered by the F. river passed to the grantee.

Held, however, that the plan and description of the lot, together with the other circumstances of the case, shewed that by the "water's edge" was meant the edge of the lake, *i. e.*, the shoal above mentioned, which was to be taken as the margin of the lake, and the course indicated was across the lake on the line of the said shoal, so that the bed of the river crossing the half lot passed to the grantee, notwithstanding that by this interpretation about fourteen acres above the quantity mentioned in the patent passed thereby.

There being a reasonably accurate particularization of the four boundaries, the quantity of acres must not be regarded as the controlling term of the description.

The fair presumption was that such a course was meant as would give the most direct points of connection between the termini thereof.

Where a river flowed diagonally through a certain lot of land, and the owner of the lot granted the part thereof lying N. or E. of the said river to one party, and the part lying S. or W. of the said river to the other party: *Held*, that this would carry the ownership of the soil to the mid thread of the river to the respective parties, no evidence of intention inconsistent therewith appearing upon the instrument.

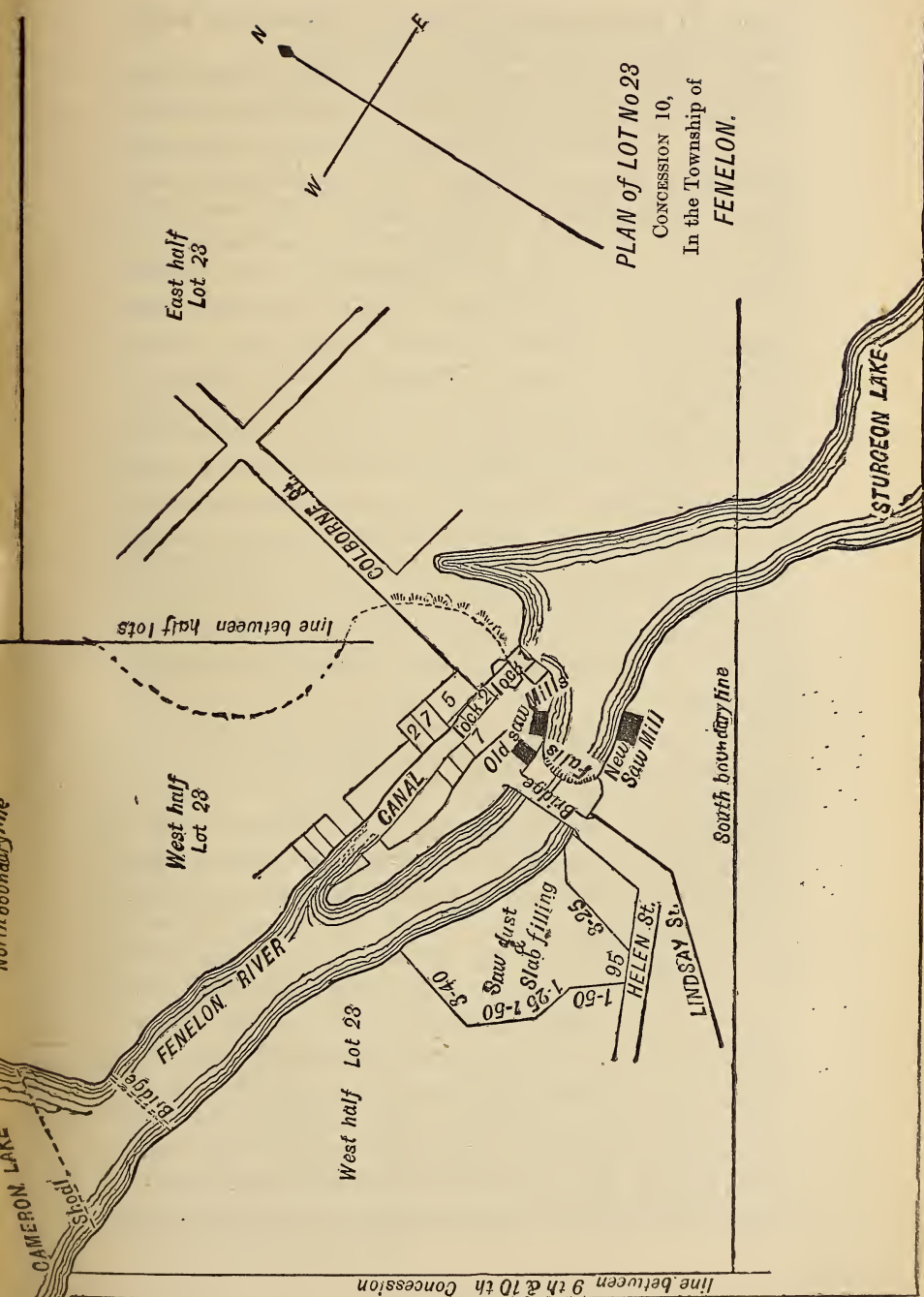
IN this matter certain lands were expropriated by the Minister of Railways and Canals in the village of Fenelon Falls for the purposes of the Trent Valley canal under the authority of 31 Vic. ch. 12 (D.) and 37 Vic. ch. 13 (D.)

The title to the lands being doubtful or defective, the compensation money was paid into court under the provisions of 37 Vic. ch. 13 (D.), and an order was made on February 12th, 1884, by Ferguson, J., directing the issue of a notice and advertisement for claimants to file their claims to it.

Among the lands thus expropriated was a portion of the Fenelon river covered with water. One R. C. Smith filed a claim as owner of the bed of the river, besides the other lands expropriated, and as therefore entitled to the compensation money in court. Other claims were filed to other portions of the lands expropriated, but Smith was the only claimant to the bed of the river, subject to incumbrances.

On April 23rd, 1884, an order was made, also, by Ferguson, J., referring the question of title to all the lands expropriated in this matter to the Master of this court at Lindsay, who, on October 29th, 1885, made his report to the effect that as far as regards the bed of the river claimed by Smith, the said Smith was the owner thereof from a point immediately below the Fenelon Falls to Cameron's Lake, subject to the public easement of a right of passage with canoes and small boats from Cameron's Lake to a point on the north side just above the falls, and also subject to the public user thereof for the purpose of driving saw logs and timber during the spring, summer and autumn freshets, and also subject to two mortgages to James G. Williams and Michael Babcock.

In the Master's office various plans were filed, including one made by Kirkpatrick in 1824, and one made by Caddy in 1884, but the plan on the adjoining page sufficiently



shews the lands expropriated and the lands in the immediate vicinity for the purposes of this report.

The patent, dated the 9th day of July, 1832, of the west half of the township lot (which includes the lands in question), was also filed, by which the land was granted to the Hon. Duncan Cameron. The land was thus mentioned and described in this patent: "The west $\frac{1}{2}$ of Lot 23, in the 10th Concession of the Township of Fenelon, in the County of Durham, in the District of Newcastle, commencing where a post has been planted at the south-west angle of the said half lot, then north 73 degrees 15 minutes east 33 chains, 33 links and a $\frac{1}{2}$ more or less to the centre of the said concession. Then north 16 degrees 45 minutes west 30 chains more or less to the northern limit of the said lot. Then south 73 degrees 15 minutes west 24 chains more or less to Cameron's Lake. *Thence southerly along the water's edge to the allowance for the road between the 9th and 10th concessions.* Thence south 16 degrees 45 minutes east 21 chains more or less to the place of beginning, *containing 76 acres more or less, together with the waters thereon lying and being.*"

Evidence was given on behalf of the government by Mr. Rubidge and Mr. Caddy, provincial land surveyors, to the effect that if they were surveying the lot from the description in the patent, they would proceed from the point where the north boundary touches Cameron's Lake, *southerly along the water's edge, till the eastern boundary of the half lot was reached. Then cross what is known as the Fenelon River, on the imaginary eastern boundary line of the half lot, and continue northerly along the water's edge until the line between the 9th and 10th Concessions was reached.* This, the witnesses submitted, would, according to the direction in the patent, be going *southerly* from the point of commencement to the easterly boundary line of the half lot, and as they could not go off the lot, in describing it, they would then cross the waters known as Fenelon River on the above imaginary or extended eastern

boundary line, and resume the description on the other side of the stream, going northerly to the line between Concessions 9 and 10. This method of description would exclude the land covered by the waters of the Fenelon River from the land granted to the patentee.

Two witnesses were examined on behalf of the claimant Smith, one of whom was a provincial land surveyor, who considered the proper method of describing the lot to be that stated in the learned chancellor's judgment, *infra*, which would include the bed of the river.

The original survey was made in 1824, and a copy of the original field notes was put in as evidence, which shewed one-third of the concession line between concessions 9 and 10 to be in Cameron's Lake : that the whole lot (east and west halves) contained 190 acres, and that all the water was on the west half, so that upon the original figures, 100 acres of land would be attributed to the east half and 90 acres to the west : that the amount of land in the west half was 76 acres (the amount granted by the patent), which would be about the proper acreage of land in said half lot *less* the land covered by the waters of Cameron's Lake and the Fenelon River, the former of which infringed upon the north-west corner of the half lot, the latter running through it and dividing it into two parts.

The title, as proved by the claimant Smith, shewed that the patentee granted the land mentioned in the patent, in 1833, to Robert Jamieson in fee simple, who subsequently, by his will dated 1850, devised the same to trustees, by whom the land was partitioned. The conveyances made by these trustees granted the part of said half lot *lying north or east of said river* to one party, and the land lying on the *south or west of the river* to another party.

After many intermediate conveyances by the assignees of the grantees of these respective parts, the claimant Smith, by separate grants, became the sole owner in fee simple of the land on either side of the river, and by virtue of these grants claimed the fee in the bed of the Fenelon River, which he contended had been granted by the Crown to the original patentee.

Considerable evidence was taken in the Master's office, touching the nature, formation and navigability of the stream, and as to the locality in the immediate vicinity, but owing to the judgment of the learned Chancellor, *infra*, it is unnecessary to state it at much length.

It appears that there was a shoal or ledge of rock (parts of which were sometimes exposed above the water) across the River at its place of issuance from Cameron's Lake. This shoal was indicated on the map made for the Government in 1835, and filed as an exhibit. The falls on the River are called "Cameron's Falls," and the river is marked as navigable. It was contended by the claimant Smith that this shoal marked the point where the lake ended and the river began, while the witnesses for the Government gave it as their opinion that Cameron's Lake came down to the Falls on one side, and Sturgeon Lake came up to the Falls on the other, and that Fenelon River existed only in name. The river was very rapid and only navigable for canoes, punts, lumbermen's, and other small boats, and these only at certain seasons of the year, on account of the rapidity of the stream. A steam vessel, called "The Boboconk," had, prior to the erection of the railway bridge, shewn on the plan, run down the river from Cameron's Lake, as far as the mouth of the canal, also shewn on the plan.

The river was chiefly used by the public for the passage down of logs, timber, &c.

The Minister of Railways and Canals appealed from the report, on the ground that the Master should have reported that the fee in the bed of Fenelon River was vested in the Crown. The following were the reasons of appeal :

1. That by the description in the patent, the bed of the river was not granted to the patentee, and that the title was therefore in the Crown.

2. If the bed of said river was included in the original grant, it never became vested in the claimant Smith but remained in the trustees of the Jamieson Estate, who only granted the land north and south of the river.

3. That the river was a public, navigable river, or capable of being made so, or part of a well-known system or chain of navigable waters, or a connecting link between two bodies of navigable waters, and as such, the title to the same was vested in the Crown.

4. That the claimant Smith did not become the owner of the bed of the river, by virtue of his ownership of the land on either side of the river.

The appeal came on for argument on December 23rd, 1885, and was partly argued on that day, the argument being continued and completed on January 7th, 1886.

C. Robinson, Q. C., and *Nelson*, for the Minister of Railways and Canals. We say that the area of water is not included in the grant to the patentee, but that the metes and bounds signify that you must go round the edge of the water in a roundabout course, so as to exclude the river. The area covered with water is some twenty acres, and if it is included in the patent, the grant would be some ninety-six acres, instead of seventy-six, as mentioned therein. The river is, we contend, a navigable one, and if so the bed did not pass to the grantee. On this point we refer to: *McLaren v. Caldwell*, 6 A. R. 456; *Gage v. Bates*, 7 C. P. 116; *Warin v. London & Canadian Loan and Agency Co.*, 7 O. R. 706; *Gould on Waters*, sect. 79-83; *The Montello*, 20 Wall. 430; *Kains v. Turville*, 32 U. C. R. 17; *Kirchhoffer v. Stanbury*, 25 Gr. 413; *Angell on Watercourses*, 7th ed., secs. 546-550; *Hawkins v. Mahaffy*, 29 Gr. 326; *Cockburn v. Eager*, 24 Gr. 409; *McArthur v. Gillies*, 29 Gr. 223; *Attorney-General v. Harrison*, 12 Gr. 466; *Rice v. Ruddiman*, 10 Mich. 125. If the patent does not exclude the river, what is the effect of the deeds under which Smith claims? As to this we refer to *Rockwell v. Baldwin*, 53 Ill. 19; *Robertson v. Watson*, 27 C. P. 579.

D. McCarthy, Q. C., and *A. R. Creelman*, for R. C. Smith and Williams, mortgagee. The patent is of the west half

of lot 23 in the 10th concession, and that governs the particular description : *Huntsman v. Lynd*, 30 C. P. 100 ; *Gillen v. Haynes*, 33 U. C. R. 516 ; *Cartwright v. Detlor*, 19 U. C. R. 210. By common law our land will go to mid-lake : *Bristow v. Cormican*, L. R. 3 App. Cas. 641 ; *MacKenzie v. Bankes*, *ib.* 1324. As to the waters being navigable, and the effect thereof, we refer to *Regina v. Meyers*, 3 C. P. 305 ; *Lyon v. The Wardens, &c., of the Fishmongers' Co.*, L. R. 1 App. Cas. 662 ; *McLaren v. Caldwell*, 6 U. C. R. 456, 8 S. C. R. 435. But the evidence is all one way, that this is not a navigable stream.

McMichael, Q.C., for Babcock, mortgagee.

Robinson in reply referred to *Coulson & Forbes' Law of Waters*, p. 58 ; *Crandell v. Mooney*, 23 C. P. 212.

January 20th, 1886. BOYD, C.—I cannot say that I entertain the slightest doubt that the patent to Captain Cameron of the west half of lot 23 in the 10th concession of Fene-lon carried the bed of the river (so called) which is formed upon that lot, issuing from Cameron's Lake and flowing down to Sturgeon Lake. I should come to this conclusion looking merely at the plan and description of the lot, but this view is strongly confirmed when the patent is construed in the light of the evidence touching that locality. There was originally at the date of the first survey in 1824 a shoal (a good part of which was exposed) between the lake and river running across its place of issuance from the lake in a southerly direction. At or just below that point the river flowed in rapids and was not navigable even for canoes and light craft, and the custom was to portage them in high water from the falls below to the lake above this shoal. (See Ranney's, Wallis's, and Duggan's evidence.) When one looks at Kirkpatrick's map of the original survey, it is evident that he did not consider that the waters carried by this river were excluded from the lots through which it passed. His marginal abstract of broken lots shews that he regarded these only in that category which were covered by the waters of the lakes. Lots 19, 20, 21 ,

and 22 in Concession 10 are intersected by the river, but no deduction is made from their acreage on that account. This lot 23 is classed as a broken lot, but only because (as the plan and his field notes shew) it was impinged upon by the lake. I agree with the argument that the term "lake" is not used in the plan and deeds as a vague term, but represents a well defined area, which at this lot is bounded by the shoal and rapid water forming the river, or channel of out-flow from the lake.

Looking at the patent we find that it describes one parcel of land called the west half of lot 23, containing 76 acres, more or less, together with the *waters* thereon lying and being. The four boundaries are given, and I find no difficulty in reading the course described as "southerly (*i.e.*, from Cameron's Lake) along the water's edge to the allowance for road between the 9th and 10th concessions" as indicating a line along the edge of the lake, which is the only water there referred to, which may be not incorrectly designated as running generally in a southerly direction till it reaches the road allowance. The fair presumption is, that such a course should be chosen as would give the most direct points of connection between the termini of this course, and it seems to me a strained construction so to read these words as to make this line follow the course of the stream down till you join the second boundary line, then cross the stream at that point along this line, and then follow up the stream till you reach the lake, and so along the edge of the lake to the road allowance. This sinuous boundary could only be adopted if very express words were so to prescribe. The effect of this construction would be to separate the half lot into two distinct parcels, and we should expect to find some more precise indication of intention to warrant this conclusion.

Again, I do not see how any proper description embracing any particular property can be found in the patent unless "along the water's edge" refers to the edge of the lake, because if you read that as referring to the river you get down to the point of juncture where the river and

the second course of the description intersect, and you have no warrant in the deed for leaving the water's edge and leaping across to the other side of the stream, so as to pursue the water's edge upwards to the allowance for road between the 9th and 10th concessions.

The strongest point against this view was urged by Mr. Robinson, Q. C., that the acreage in the original patent shews that all the land covered by water was excluded. It appears by the original survey that the whole lot amounted to 190 acres, but it appears that all the water is on the west half, so that upon the original figures 100 acres would be attributed to the east half and 90 acres to the west half. The patent of this last west half, however, speaks of it as containing "76 acres more or less." It is to be observed that the survey was made in 1824, and the patent does not issue till 1832. Mr. Rubidge, provincial land surveyor, caused a survey and plan to be made lately of the west half by Mr. Caddy, which is in evidence. By this plan the water shown on the west half, including all the lake and river is about 20 acres, which would leave 70 acres of land not covered with water in the half lot. He explains this discrepancy between 70 and 76 by saying that the water has been forced back by the dam, so that there is not as much land as when the original survey was made. I do not think over much stress should be laid upon this conjecture. I observe that all the measurements given by Mr. Caddy vary from those in the original patent. It would seem made land has been formed at the southern edge of the lake, and that some has been submerged at the northern edge, following the measurements of the patent as compared with those given by Mr. Caddy. For instance, the first course in the patent is 33 chains, $33\frac{1}{2}$ links. Mr. Caddy gives it as 31 chains, 38 links. He does not give the distance of his second course. His third is 17 chains, 40 links; in the patent it is 24 chains. His last is 21 chains, 62 links; in the patent it is 21 chains. The case most in his favor is *Herrick v. Sibby*, L. R. 1 P. C. 436, but it does not apply here, because, having a reason-

ably accurate particularization of the four boundaries, the quantity of acres must not be regarded as the controlling term of the description.

The whole appeal upon this point is thus concluded in favor of the respondent. It is not needful to consider whether this stream can be deemed navigable in law because susceptible of being made so, or because it forms a connecting link between two bodies of navigable water. Even if the affirmative of this could be held, it would still leave the title in the soil as conveyed by the patent out of the Crown, and it becomes, in this aspect of the case, merely a speculative question which cannot affect the result. Therefore I do not further advert to this view of the case.

It was questioned whether the river bed passed to the present claimant Smith under the conveyance from the Jamieson trustees, by whom the land was partitioned in 1853. The conveyance made by these trustees deal with one part of the land as being on the east side of the river, and on the north of the river, and with the other part as being on the west side of the river. These words are sufficient, by construction of law, to carry the ownership of the soil to the mid-thread of the stream when no evidence of intention inconsistent therewith appears upon the instruments; and it has not been argued that there is any such evidence to rebut this presumption. The appeal should therefore be dismissed, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

VERMILYEA V. CANNIFF.

Patent—Assignment of territory—Defence of others manufacturing—Absence of fraud—Estoppel.

The plaintiffs being the patentees of a certain article, by memorandum in writing, under seal, reciting that they were the inventors of the article in question, assigned all their interest in the patent to the defendant for a certain district or territory in consideration of certain royalties and sums of money therein agreed to be paid by him.

In an action to recover the consideration in which the evidence of the defendant went to shew that he knew before the first year after the making of the contract had expired that others were manufacturing the patented article, but he did not complain or repudiate the transaction, or refuse to pay, or offer to reassign, or require the alleged infringers to desist, or call upon the patentees to vindicate their patent, and that he had a profitable user of the invention to a substantial extent.

Held, that in the absence of fraud, or warranty, or representation which induced the bargain and was falsified in the result, such a contract was simply for the purchase of an interest in an existing patent. No assumption arises, and no implication is to be made that the patent is indefeasible.

The plaintiffs were therefore held entitled to judgment.

Smith v. Neale, 2 C. B. N. S. 67, and *Hall v. Conder*, 2 C. B. N. S. 22, commented on; *Hayne v. Malby*, 3 T. R. 438, and *Saxton v. Dodge*, 37 Barb. (N. Y.) 84, distinguished.

THIS was an action brought by Solomon Vermilyea and Hannah Melissa Vermilyea, who were patentees of certain improvements in corsets, and who had assigned all their interest therein for a certain territory or district to the defendant J. W. Canniff, for the balance of the purchase money thereof, and an account of royalties under the deed of assignment set out below (a)

(a) To all to whom these presents shall come. We, Solomon Vermilyea and Hannah Melissa Vermilyea, of the city of Belleville and Province of Ontario, send greeting:

Whereas, the said Solomon Vermilyea and Hannah Melissa Vermilyea have invented certain new and useful improvements on corsets, the title whereof is "Vermilyea's self-fitting corset," and have applied for and have obtained letters patent under the great seal of Canada, granting to them and to their assigns, the exclusive right to make and vend the same, which letters patent are dated on the 1st day of March, A.D., 1881, and numbered 12436, and a copy of which is hereto annexed.

And whereas, Wallace Canniff, of the aforesaid city of Belleville, has agreed to purchase from the said Solomon Vermilyea and Hannah Melissa Vermilyea, all the right, title and interest which they the said inventors

Several defences were set up by the defendant, the principal ones for the purposes of this report being that the plaintiffs knew that they were not the original inventors of the said alleged inventions in the patents referred to, and that the agreement was fraudulently entered into by the plaintiffs and that no consideration was given to the defendant.

The action was tried at Belleville on the 7th of April, 1886, before Boyd, C.

Clute and Williams, for the plaintiffs. The patent being a valid patent in law the plaintiff is entitled to recover. No fraud is established and no eviction shewn, and the defendants having got the benefit of the patent and what they bargained for are bound to pay for it: *Lawes v. Purser*, 6 A. & E. 930; *Noton v. Brooks*, 7 H. &

and all the improvements they may afterwards make thereon in and for the Province of Manitoba and the Northwest Territory under the said letters patent, for the price or sum of twelve hundred dollars;

NOW THESE PRESENTS witness that for and in consideration of the said sum of twelve hundred dollars of lawful money of Canada by the said Wallace Canniff paid, the said Solomon Vermilyea and Hannah Melissa Vermilyea have assigned and transferred, and by these presents do assign, transfer and set over unto the said Wallace Canniff, his executors, administrators and assigns the full and exclusive right to the invention made by them, and secured to them by the said letters patent, and all their interest therein or right thereto, and all improvements thereon in course of completion for the same, for which an application for a patent has been made, or may be hereafter made by them the said assignors thereon, in and for the Province of Manitoba and the Northwest Territory. The said sum of twelve hundred dollars hereinbefore mentioned, as the consideration of this assignment is to be paid to the said assignors by the said assignee as follows:

The sum of one hundred and fifty dollars at the sealing and signing hereof (the receipt whereof is hereby acknowledged) a royalty of fifteen cents on every corset manufactured by the said Wallace Canniff during the first next year after date hereof, payable at the office of the said assignors in Belleville. The said royalty to be paid monthly during the first said year. The balance of the twelve hundred dollars after deducting the one hundred and fifty dollars and the amount of royalty that may be paid during first year to be paid as follows. viz.: One half on the first

N. 499. There is no implied warranty in the sale of the patent, and it is taken for what it is worth in the absence of fraud: *Hall v. Conder*, 2 C. B. N. S. 22, 39, 40; *Crossley v. Dixon*, 10 H. L. C. 293; *Smith v. Neale*, 2 C. B. N. S. 67; *Benjamin on Sales*, 4th Am. ed., 834, 835, par. 955, *Bigelow on Estoppel*, 3rd ed. 433. *Henderson v. Mostyn Copper Co.*, L. R. 3 C. P. 202; *Cutler v. Bower*, 11 Q. B. 973; *Gray v. Billington*, 21 C. P. 288; *Addison on Contracts*, 8th ed. 973; *Green v. Watson*, 2 O. R. 627.

Cassels, Q. C., and *Burdett*, for the defendants. The patent was void for prior user and the plaintiffs must have known this: *Smith v. Goldie*, 7 A. R. 628, 641, 642;

of November, A.D., 1883, and the remaining one-half on the first of May, A.D., 1884. If payments made promptly when due, no interest is to be charged, if default be made, interest to be paid at six per cent. per annum.

It being distinctly understood and agreed upon that understanding and agreement the said patent is hereby assigned for the territory above mentioned, that the said Solomon and Hannah Melissa Vermilyea retain a lien thereon for the amount that from time to time during the said period up to the first of May, A.D., 1884, may be due the said Solomon Vermilyea and Hannah Melissa Vermilyea under above agreement, and all parties purchasing the right to manufacture according to said patent in any portion of said territory, purchase subject to said lien, and the amount due thereon; and further, in the event of the failure of the said Wallace Canniff, or assigns, or any of them for four months after the same falls due, that then, and in (that) case the whole amount of the balance becomes due at once and the said Solomon and Hannah Melissa Vermilyea have the right to at once retake the said patent and dispose of the same in said territory, as if this agreement had never been made, and time is to be the essence of this agreement. It is also understood and agreed that all improvements on said patent that may be hereafter patented by said Solomon Vermilyea and Hannah Melissa Vermilyea, will be the property of the said Wallace Canniff in the said territory above mentioned, but subject to the payment of said twelve hundred dollars.

In witness whereof the said Solomon Vermilyea and Hannah Melissa Vermilyea and Wallace Canniff have hereto set their seals this day of April. A.D., 1883.

Signed, sealed and delivered in presence of :

(Signed.)

S. C. O'BRIEN,

(Sd.)

SOLOMON VERMILYEA,

"

H. M. VERMILYEA,

"

J. W. CANNIFF.

Ball v. The Crompton Corset Co., 9 O. R. 228. There is a distinction between a licensee and an assignee as to estoppel. When the plaintiffs sold they had no title, so there was a failure of consideration: *Saxton v. Dodge*, 57 Barb. N. Y. 84. In *Hall v. Conder*, there was no plea of fraud on the record. The defendants are entitled to a rectification of the document. The evidence shews that nothing has been made under the patent since the first year. We refer to *Cross v. Huntley*, 13 Wend. 386 (N. Y.); *Head v. Stevens*, 19 Wend. 411; *Darst v. Bockway*, 11 Ohio 462; *Cragin v. Fowler*, 34 Vt. 326; *Geiger v. Cook*, 3 Watts & Serg. (Penn.) 268; *Blight's Lessee v. Rochester*, 7 Wheaton U. S. S. C. 535.

Clute, in reply.

At the conclusion of the case the learned Chancellor gave judgment in favour of the plaintiff on all the facts in issue on the record except as to the validity of the patent, which he reserved, as well as the question of law as to the plaintiff's right to recover if the patent was invalid. Subsequently he gave the following judgment:

June 5, 1886. BOYD, C.—In 1882 the patentees transferred a part of their interest in the patent to the defendant by an instrument under seal to which all were parties. The patent was for five years from the 1st March, 1881, but was renewed during this action. The payments were to be made for the first year by royalties, and the balance in two payments of lump sums in 1883 and 1884. There was a provision that in default of payment for four months the whole of the unpaid balance should be presently payable. The recital stated that the plaintiffs had invented new and useful improvements in corsets, and that the defendant had agreed to purchase all the right, title, and interest of the plaintiffs in the invention for a certain territory, and by the body of the deed there was assigned to the defendant the full and exclusive right to the invention made by the plaintiffs, and secured to them by the patent, and all their interest therein. Payments were

made with tolerable punctuality for the first year, and then ceased without any reason being given to the patentees.

If the evidence of the defendant is to be implicitly received he knew long before the first year had expired, that others were selling corsets similar to those patented, but instead of complaining of this, repudiating the transaction, refusing to pay more, and offering to reassign what he had received, he goes on with these payments, refers in commendatory terms to his success in the letters of remittance, never requires the alleged infringers to desist, and never calls on the patentees to protect their monopoly, or vindicate their patent.

The patent has not been avoided, and has not been attacked, and while many unproved defences are raised, it is not pleaded or in evidence that there has been an open invasion of the patentee's rights by competing manufacturers, or that the defendant has been prevented from having some beneficial use of the patent because of its alleged invalidity. The evidence falls far short of shewing a total failure of consideration; there has been, on the contrary, a profitable use of the invention by the defendant to a substantial extent.

Had the defendant been able by evidence to bring himself within the authority of *Lovell v. Hicks*, 2 Y. & C. Ex. 40, and to establish fraud on the part of the plaintiffs in palming off this invention for value when they knew it to be a worthless thing, then he could claim a favourable judgment, but failing this, the case falls within the decision cited by Mr. Clute of *Hall v. Conder*, 2 C. B. N. S. 22, affirmed in appeal at p. 53. The concluded contract between the parties contains no clause of warranty and it contains the language of both parties that the plaintiffs have invented the subject-matter of the patent.

At the close of the evidence I exculpated the plaintiffs from the charge of fraud, and stated my conclusion to be that all parties believed that the plaintiffs had a good and valuable patent. No representations were made by the plaintiffs which induced the bargain and were falsified in

the result, other than may be gathered from the terms of the written contract. In the absence therefore of fraud, or warranty, or representation, such a contract as the present is simply for the purchase of an interest in an existing patent. No assumption arises, and no implication is to be made that the patent is indefeasible. Each party knowing what the invention is, and having the like and equal means of ascertaining whether it is new and useful, acts on his own judgment. The assignment placed the defendant *quoad* his territory in the same position as the plaintiffs with reference to the patent. The defendant thus gets all he bargained for; he has also used and had the benefit and protection of the patent since 1882 to a greater or lesser extent. Hitherto it has not been impeached, and it is not needful for me now to enter upon any inquiry as to its validity, since that is not material upon the present record, because his own sealed engagement, and his attitude and action thereunder fix him with liability to pay what is demanded.

In *Smith v. Neale*, 2 C. B. N. S. 89, Wills, J., referring to *Hall v. Conder*, says: "that there the contract was for the use of the plaintiffs' right such as it was, without regard to whether it could be sustained upon litigation or not;" and, he adds, "there is nothing unreasonable or uncommon in such a bargain." The reasoning of the Judges in *Lawes v. Purser*, 6 E. & B. 930, makes strongly in the plaintiffs' favour, and in the latest English case of *Smith v. Buckingham*, 18 W. R. 314; S. C., 21 L. J. N. S. 819, the doctrine of *Hall v. Conder* is corroborated.

Hayne v. Maltby, 3 T. R. 438, cited by Mr. Cassels, though of somewhat impaired authority is not in point however it may be viewed. As put in the opinion of some of the Judges who disposed of it, that case was regarded as one in which the plaintiff had *fraudulently* asserted that he had a right to the patent. But here that ingredient is wanting. According to the view of Patteson, J., in *Bowman v. Taylor*, 7 A. & E. 278, *Hayne v. Maltby* is not properly a case of estoppel at all, while this unques-

tionably is, since the instrument signed and sealed by the defendant must be regarded as containing his language as well as that of the patentees. As viewed by Cottenham, C., in *Neilson v. Fothergill*, 1 Webst. P. C. 290, *Hayne v. Maltby* only decided that although a person has dealt with a patentee, and carried on business, he may stop, and then the one who claims to be patentee cannot recover without giving the defendant an opportunity of disputing his right as patentee.

Saxton v. Dodge, 57 Barb. (N. Y.) 84, also cited by Mr. Cassels, is broadly distinguishable from this case, for not only does it rest upon the ground of actual fraud, but it appears that express representations were there relied upon which were falsified in the result. I have not fully investigated the States decisions, which are of course not binding upon me, but I rather think it will be found that the more recent cases are not in conflict with my conclusions. I may refer to *White v. Lee*, 14 Fed. Rep. 789 (Mass. 1882), and *McKay v. Jackman*, 17 Fed. Rep. 641 (N. Y. 1883), which hold that a licensee is not exonerated from payment by a mere defence that the patent is invalid, he must go further and establish an eviction or deprivation of all benefit thereunder.

I notice that in a rather recent Indian appeal before the Privy Council, *Hall v. Conder* was referred to as a correct exposition of the law by Sir James Colville: *Dorab Alley Khan v. Abdool Azeez*, L. R. 5 Ind. App. 127.

Judgment will be for the plaintiffs for the sums due under the assignment, which can be fixed by the Registrar with costs of action.

G. A. B.

[CHANCERY DIVISION.]

PARTLO V. TODD.

Trade Mark and Design Act of 1879—Action to restrain infringement of registered trade-mark—Prior user—Definition of trade-mark.

In an action to restrain the infringement of a trade-mark registered under the "Trade Mark and Design Act of 1879."

Held, following *McCall v. Theal*, 28 Gr. 48, that prior user can be given in evidence to invalidate the trade-mark.

Held, also, that the words "Gold Leaf" used in the plaintiff's trade-mark distinguished the flour made by the plaintiff from that made by any other person, and, as such, was a proper subject of a trade-mark within the language of section 8 of the Act.

Held, also, on the evidence that "Gold Leaf" was a common brand for patent flour in use before the registration of the plaintiff's trade-mark, and that "the plaintiff had not the right to endeavour to attribute to that which he might manufacture a name which had been for years before a well-known and current name by which that article was defined," and that there must be judgment for defendant with costs.

THIS was an action brought by William Partlo against Thomas Todd and Martin N. Todd, to restrain the infringement of a trade-mark, and for damages.

The material parts of the statements of claim and defence are set out in the judgment.

The action was tried at the sittings at Woodstock on May 3rd, 1883, before Proudfoot, J.

Cassels, Q. C., and *Jackson* for the plaintiff. The plaintiff is entitled to relief, as his position, under section 8 of the Trade-mark and Design Act of 1879 is the same as it would be under the Imperial Act after five years' registration. Section 15 shows how a mistake may be rectified, and section 17 gives the right of action. Even if the mark had been used, if it was not used continuously, it is no defence. The evidence shows it was intentionally discontinued: *O'Rourke v. Central City Soap Co.*, 26 Fed. R. 578; *Holt v. Menendez*, 23 Fed. R. 869; *Atlantic Milling Co. v. Robinson*, 20 Fed. 217. It is not necessary that the marks should be identical; it is sufficient if a purchaser would be deceived: *Barsalou v. Darling*, 9 S. C. R. 677.

Moss, Q. C., and *G. W. H. Ball* for the defendants. The trade-mark may be disputed by the defendant. There is no remedy for him before the Minister of Agriculture, as the statute provides no tribunal to try the question in issue here. Section 5 shows that the Minister may object to register a trade-mark for certain reasons, and section 8 shows what are trade-marks. A trade-mark may be invalidated on the ground of prior user: *McCall v. Theal*, 28 Gr. 48; *Davis v. Reid*, 17 Gr. 69. The words "Gold Leaf" are *publici juris*. The Imperial statute also makes registration of the trade-mark *prima facie* evidence for five years, and after that, if not questioned, it becomes absolute. The plaintiff must show exclusive right: *Compagnie Laferme v. Kendricks*, W. N., July 20, 1876; *Withraus v. Braun*, 44 Maryland 303; *Weston v. Ketcham*, 51 Howard P. R. 455. The claim here is for the whole device, which really is not the subject of a trade-mark at all, as apart from the words "Gold Leaf," it is only descriptive, and does not distinguish the quality of the goods, and so is not within the Act. The flour is just the same as made by all millers: *Ex. p. Stephens*, 3 Ch. D. 659; *Rose v. Evans*, 48 L. J. Ch. 618; *In re J. B. Palmer's Trade-mark*, 24 Ch. D. 504; *Norton v. Nicholls*, 1 E. & E. 761; *Lazarus v. Charles*, L. R. 16 Eq. 117; *Millington v. Fox*, 3 My. & Cr. 338; *Hall v. Barrows*, 32 L. J. Ch. 548; *Moet v. Couston*, 33 Beav. 578; *Moet v. Pickering*, 8 Ch. D. 372; *Sebastian's Law of Trademarks*, 2nd ed., 49, 53; *Stokes v. Landgraff*, 17 Barb. (N. Y.) 608; *Manufacturing Co. v. Trainer*, 101 U. S. R. (S. C.) 51. If there is no trade-mark, there is no fraud in attempting to sell the flour as plaintiff's which was not his: *Singer Manufacturing Co. v. Wilson*, 2 Ch. D. 434; *Civil Service Supply Association v. Dean*, 13 Ch. D. 513; *Sebastian*, 2nd ed., 120; *Gage v. Publishing Co.*, 6 O. R. 68; *Ford v. Foster*, L. R. 7 Ch. 611; *The Singer Manufacturing Co. v. Loog*, L. R. 8 App. Cas. 15, 27.

Cassels, Q. C., in reply. A trespasser has no right to question the validity of the trade-mark.

June 16, 1886. PROUDFOOT, J.—Action to restrain the use of a trade-mark, and for damages.

The plaintiff is a miller at Ingersoll, the defendants are commission merchants at Galt.

The plaintiff states, in his statement of claim, that sometime prior to October, 1884, he had perfected a certain brand of Roller Process Flour at his mill, and named the brand "Gold Leaf," and procured it to be registered on the 19th December, 1884, in the Department of Agriculture.

The certificate of registration certifies that this trade-mark (specific) to be applied to the sale of flour, and which consists, within a circle, of the words "Gold Leaf," surmounted by the number 196, and also underneath the said designation, the word Flour, and the registrant's name, the whole surrounded by the words "Ingersoll Roller Mills, Ont., Can.," arranged as per an annexed pattern and application, was registered by the plaintiff under the Trade-mark and Design Act of 1879.

The plaintiff alleges that this was well known to the defendants. That since the 3rd December, 1884, the defendants have branded and marked their flour, which is of an inferior quality, with a mark similar to the trade-mark of the plaintiff, and have sold the same as purporting to be the "Gold Leaf" of the plaintiff, and have thereby caused the plaintiff great loss and damage. That plaintiff's flour has acquired a good reputation all over the Dominion of Canada, and is in great demand, and has a large sale. And the defendants well knowing this, and with the object and intent of selling flour of an inferior brand and less value as the flour of the plaintiff, have branded their flour with a mark similar to that of the plaintiff, and the similarity of the marks enables the defendants to deceive and mislead the public by selling their flour as the flour of the plaintiff, and the defendants do in fact fraudulently put their flour in the market as the flour of the plaintiff, to his great prejudice and loss. That plaintiff has suffered damage by the defendants:

Firstly, in destroying the sale of the flour; Secondly, in destroying the character of the said flour, and in deteriorating its value in the eyes of flour dealers who prior to that time had dealt in "Gold Leaf," and by loss of market. The plaintiff claims damages and prays an injunction to restrain defendants from using the trade-mark; and from selling the flour as the flour of the plaintiff, or from so branding and marking the same as to enable others to deceive the public.

In their statement of defence the defendants deny the registration of the trade-mark as alleged, or if it was registered, that the registration was obtained by fraud, and pray for an order removing it from the registry. That if the plaintiff has any rights such as alleged in his claim they were not aware of their existence, and if they have infringed upon any right of the plaintiff, which they do not admit, it was done in ignorance. That plaintiff has been guilty of laches. That the design alleged in the statement of claim is only a design in the sense used in the statute so far as the word "Gold Leaf" is concerned, and submit that the other figures and words going to make up such design as registered do not, taken with the words "Gold Leaf," constitute a design capable of registration. And that the word "Gold Leaf" was a word well known in the trade, and in common use by parties other than the plaintiff, and that the same, therefore, was not capable of registration, and that the plaintiff falsely stated that the same was a new and original word or design of his own, in order to obtain registration of the same. And the defendants pray that it may be removed from the Registry.

The *gravamen* of the plaintiff's complaint is the use of the word "Gold Leaf." The defendants offered evidence to shew that the word was in common use as a designation of flour. The plaintiff objected to its reception, because the mark could only be invalidated by the Minister of Agriculture, and that prior user was of no effect as against the registration. I received the evidence subject to the objections.

By the Trade-mark and Design Act of 1879 (D.), sec. 4, no person is entitled to institute any proceeding to prevent the infringement of a trade-mark until it is registered. If the question turned only upon this section, I do not doubt that prior user might be shown in an action for infringement, and that it would be a good defence.

But this is followed by the 8th section. The trade-marks are registered for the exclusive use of the party registering, "and thereafter he shall have the exclusive right to use the same to designate articles manufactured or sold by him."

The Imperial Act of 1875 (38 & 39 Vic. ch. 91), sec. 3, made the registration *primâ facie* evidence of the right to the exclusive use of the trade-mark, and, after five years from registration, it was to be conclusive evidence of the right to the exclusive use. And this provision is repeated in the Act of 1883 (46 & 47 Vic. ch. 57), sec. 76, but the sections in both these Acts made them subject to the provisions of the Acts—which contained a mode of removing the registration from the Registry, that was not prevented by the lapse of the five years.

In the Imperial Act provision is made for rectification of the Register by the High Court of Justice. And the cases decided under that Act determine that after five years the certificate confers exclusive right, and it cannot be impeached by the defendant in an action; but notwithstanding the lapse of five years it may be removed from the Registry: *Edwards v. Dennis*, 30 Ch. D. 454; *In re Wragg's Trademark*, 29 Ch. D. 551; *In re Lloyd & Son's Trademark*, 27 Ch. D. 646; *In re Leonard & Ellis's Trademark*, 26 Ch. D. 288.

In our statute there is no time specified during which the registration should be only *primâ facie* evidence, but it is placed at once upon the footing of an English trade-mark after five years' registration.

Section 5 authorizes the Minister of Agriculture to object to register trademarks in four classes of cases, none of which includes the present. And the 15th section

provides for the decision of cases of doubtful ownership by the Minister of Agriculture, or his Deputy, after having notified and heard the interested parties, and concludes with the sentence: "and any error in registering trade-marks, or any oversight about conflicting registration of trade-marks, may be settled in the same manner."

Had this been unaffected by decision, I would have been inclined to think, notwithstanding the use of the word *may*, that it conferred power on the Minister of Agriculture to determine whether prior user invalidated the registration, and that a person complaining of the improper registration should apply to him to correct it.

But *McCall v. Theal*, 28 Gr. 48, has placed another construction upon it, and has decided that in an action to protect a registered trade-mark prior user may be given in evidence to invalidate it. The counsel for the plaintiff in that case said, in argument: "A very different rule is applicable in the case of trade-marks from that in the case of patents; in the former the mark may have been used by others; and yet, if another person registers the mark as his, he may be entitled to hold it." But the learned Vice Chancellor who heard the case does not seem to have acquiesced in this view, for he entered into an elaborate examination of the evidence as to prior user, and held "that the plaintiff had not the right to endeavor to attribute to that which he might manufacture a name which had been for years before a well-known and current name by which that article was defined," p. 57. I think I ought to follow that decision.

It was argued for the defendants that the device and words used here were not the subject of a trade-mark; that apart from the word "Gold Leaf," it was only descriptive; there was no pointing out of any distinguishing quality of goods. But I think it comes within the ample language of section 8 as a brand and name adopted for use by the plaintiff in his trade for the purpose of distinguishing any manufacture made by him. It distinguishes it as "Gold Leaf" flour made by the plaintiff. It distinguishes it from flour made by any other person.

It was said that the word "Gold Leaf" was *publici juris*. In one sense every word in the language is *publici juris*, but what is meant I suppose to be that it has been so used as a mark for flour as to prevent any private property in it. This will depend upon the evidence.

To constitute an infringement it is not necessary that every part of the device or brand be copied; it is sufficient if enough be copied to have a tendency to deceive the public.

I may also dispose of one of the charges in the statement of claim, for the evidence fails to prove that the flour sold by the defendants as "Gold Leaf" was at all inferior to the plaintiff's sold with that brand.

[The learned Judge then summed up the evidence, and proceeded as follows:]

I think the evidence establishes the use of the word "Gold Leaf" by the defendants, but they did not represent the flour as made by the plaintiff, and the quality was equal to the plaintiff's. It is true they did not know of any other person who had used the word as a trade-mark than the plaintiff. But it turns out that it was a common brand, and known in the lower Provinces on flour sold there by other manufacturers.

I think it is proved the "Gold Leaf" was a common brand for patent flour, in use before the registration of plaintiff's trademark, and to apply the language quoted above from *McCall v. Theal*, "the plaintiff had not the right to endeavor to attribute to that which he might manufacture a name which had been for years before a well-known and current name by which that article was defined."

Judgment for defendants, with costs.

G. A. B.

[CHANCERY DIVISION.]

REGINA V. SANDERSON.

Canada Temperance Act—Offence—Conviction—Habeas Corpus—Certiorari—Distress warrant—Commitment.

A prisoner having been convicted of an offence under the Canada Temperance Act, an application for her release was made under a *habeas corpus*, and a writ of *certiorari* was also issued.

Held, that the writ of *certiorari* must be superseded, and following *Regina v. Wallace*, 4 O. R. 127, that such writ cannot issue merely for the purpose of examining and weighing the evidence taken before the magistrate.

Held, also, that it was not necessary to serve a minute of the conviction on the defendant, as sec. 52 of 31 & 32 Vic. ch. 31, (D.), only requires such service in case of an order, and that defendant must take notice of the conviction at her peril.

Held, also, that when a distress warrant has been issued and returned, the truth of the return cannot be tried upon affidavits.

It was alleged but denied, that the bailiff had refused to receive the penalty and costs.

Held, however, that his duty was to execute the warrant of commitment, and that he had no authority to receive such payment.

The warrant of commitment which was not issued until after the return of the distress warrant, was dated the 14th June, and the distress warrant was not returned before the 17th June.

Held, that the warrant of commitment need not be dated at all if not issued too soon.

It was alleged, also, that too large a sum had been charged for costs, but,

Held, lastly, that the conviction being regular on its face, and not shewing any excess of jurisdiction, such an irregularity (even if it existed) could not be enquired into on the present application. The prisoner was therefore remanded.

THE defendant obtained a writ of *habeas corpus* directed to the keeper of the common gaol of the county of Halton, where she was confined under a warrant of commitment issued by William Hixon Young, Esq., a police magistrate of that county, upon a conviction made by him against her for having on her premises intoxicating liquor for sale contrary, to the provisions of the Canada Temperance Act.

A writ of *certiorari* was issued concurrently with the writ of *habeas corpus*, under which the conviction, evidence and other proceedings were returned and were brought into court on the return of the latter writ.

That writ having been returned and filed, *Kappele* moved for the prisoner's discharge on various grounds.

The motion was resisted by *Irving*, Q.C., on behalf of the Attorney-General and the police magistrate.

The principal objections taken to the proceedings were

1. That the costs which the defendant was ordered to pay were in excess of those which the magistrate had any power to impose.

2. That no minute of the order had been served upon the defendant before issuing the warrant of distress and subsequent warrant of commitment.

3. That no *bond fide* attempt had been made by the plaintiff to realize the amount of the penalty and costs under the distress warrant, and that the defendant had property out of which such amount ought to have been levied.

3. That the bailiff refused to accept payment of or allow the defendant time to procure the amount of the penalty at the time of the arrest.

4. That the date of the warrant of distress was wrongly stated in the warrant of commitment which recited a distress warrant of the 1st June, 1886, whereas the only warrant, of the issue of which there was any evidence, was one of the 29th May.

5. That the warrant of commitment was issued before the return of the distress warrant, as it bore date the 14th of June, and the distress warrant was not returned earlier than the 17th June.

On the merits it was also contended that the magistrate had no jurisdiction, as the evidence shewed that no offence had been committed.

July 16, 1886. OSLER, J. A.—Some of the foregoing objections are only disclosed by an examination of the conviction, evidence and documents returned under the writ of *certiorari*, and I think are not open to the defendant as such writ was, in my opinion, issued inadvertently and must be superseded. It is taken away by section 111 of the Canada Temperance Act 41 Vic. ch. 16 (D.), because, I presume, it is the policy of the

Act that convictions for alleged breaches of its enactments shall be as little as possible subject to review in the Superior Courts. No doubt it lies, notwithstanding this section, where the magistrate is proceeding without any jurisdiction. Whether such absence of jurisdiction is limited to absence of jurisdiction over the subject matter of the charge, or whether it may embrace a case where the Magistrate has convicted on the total absence of proof of the offence is perhaps, in view of the decision in *Regina v. Wallace*, 4 O. R. 127, not quite settled, but that case is, at all events, a clear and recent affirmance of the view that *certiorari* cannot issue merely for the purpose of examining and weighing the evidence which was before the magistrate. If there was any evidence the court cannot enter into the question, whether he has drawn the right conclusion from it.

In the case before me the charge was for keeping intoxicating liquor for sale. Section 119 of the Act provides that where there are found in any house, &c., a bar, counter, beer pumps, kegs or other appliances similar to those usually found in taverns, and spirituous liquors are also found in such house, such liquor shall be deemed to have been kept for sale contrary to the provisions of the Act, unless the contrary is proved by the defendant.

Here the defendant was the keeper of a public-house, and spirituous or intoxicating liquor was found in the cellar, consisting of a few dozen bottles of ale, no doubt no more than any private person might naturally have for his own use, but unfortunately for the defendant there was a bar and counter in the same house, and bottles and glasses therein.

The magistrate has not accepted the explanation offered and evidence given on behalf of the defendant, but has acted upon the statutory presumption which a certain proportion of the electors of the county have declared shall exist in that county under the circumstances I have described. His decision cannot be reviewed on *certiorari*, and that being the case I refrain from expressing any opinion

upon the propriety of the conviction and other proceedings so far as regards the merits of the case, further than this, that the opponents of prohibition cannot but desire that the Act may continue to be administered in the manner in which it has been administered in the present case.

I proceed to consider such of the present objections as are open to the defendant either on the affidavits or the commitment.

It is said that no minute of the conviction was served as required by section 52 of the Summary Convictions Act. That section only requires that a minute shall be served in the case of an *order*. The defendant must take notice of a conviction at his peril. It was argued that as to the costs directed to be paid there was an order, but I do not so read section 53, which empowers the magistrate to impose costs. The order as to costs is really part of the conviction, where there is a conviction, or of the order where there is an order: "In all cases of summary conviction or of orders made by a justice of the peace, the justice making the same, may award and order in and by the conviction or order that the defendant shall pay such reasonable costs," &c.

The distinction between convictions and orders as regards the necessity for serving a copy of the minute, is well settled: *Paley* on Convictions, 5th ed., p. 288; *Regina v. O'Leary*, 3 Pugsley N. B. 264, and *Saunders's Magistrates Courts*, 5th ed., p. 137.

2. No attempt made to levy by distress, &c.—Where the warrant of commitment can only be issued in default of sufficient distress, no doubt it may be shewn by affidavit that no distress warrant has been issued or returned, but where the distress warrant has issued and has been duly returned by the bailiff, I cannot try the truth of the return on affidavits. Here the warrant is regular on its face. The bailiff swears he made the return and that he had reason to believe it was true. It was not necessary that he should actually have gone to the defendant's

premises and searched for goods on which he might distrain if he was otherwise satisfied that it would be useless to do so. If he made an untrue return, he may be liable to an action, but the magistrate was justified in acting upon it: *Hill v. Bateman*, 2 Strange 710; *Moffatt v. Barnard*, 24 U. C. R. 498, 502.

3. The bailiff refused to accept payment of the penalty and costs or give defendant time to procure the amount.—This is denied. And I think the bailiff had no authority to receive the amount. His duty was to execute the warrant: *Arnott v. Bradly*, 23 C. P. 1; *Kilby v. Wyatt*, 11 A. & E. 777.

4. Warrant of commitment issued before the return of the distress warrant.—The former was not in fact given to the bailiff or executed until after the return of the latter. It need not have been dated at all, and so long as it is not issued too soon it is not material that it bears too early a date: *Paley on Convictions*, 320; *Newman v. Earl of Hardwicke*, 3 N. & P. 368.

5. The date of the distress warrant wrongly recited in the commitment.—This is an objection which only appears by the return to the *certiorari*, and is therefore not open to the defendant. If it were, the defect is clearly amendable, under the 118th section of the Temperance Act, and it is evidently a mere slip. There is no doubt that there was only one distress warrant, and that was duly returned. It would be my duty to make the amendment if necessary. The variance is one not material to the merits, and the case has, within the meaning of the Act at all events, been tried on the merits.

It is said that too large a sum was charged for costs, the amount mentioned in the conviction and warrant including fees which the magistrate had no right to charge. I rather think it does appear from the memorandum furnished by the magistrate that four items and perhaps more have been improperly charged. The whole amount of costs mentioned in the warrant is \$7.95. According to the memorandum, the costs ought to have been \$8.70, so that 75cts. too little

was charged. But in the \$8.70 are included the four items referred to—viz:

Information for search warrant	\$0 50
Constable executing it	1 50
Constable's assistant	1 00
<hr/>	
Total	\$3 25

Deducting this from \$8.70, and not noting another item objected to, there would seem to be an overcharge of \$2.50, as the search warrant and execution of it can form no part of the costs of this conviction. But on this point I need express no final opinion, as the question remains whether this irregularity can be enquired into on the present application.

On its face the commitment is regular, and that is all I have before me. A copy of the conviction may be proved, even where the right to *certiorari* is taken away, for the purpose of discrediting the commitment by shewing that it does not follow the conviction; but here, if I look at the conviction or a copy of it, I only find that it is also regular on its face, and does not shew any excess of jurisdiction. I cannot here reverse or quash the conviction, and while it stands unreversed, it warrants a commitment following its terms. The case would no doubt be different if on the face of the commitment or conviction it appeared that the defendant had been arrested for nonpayment of two sums, one of which the magistrate had no power to impose, such sums not being severable so, that the defendant might have avoided a legal arrest by paying or tendering the one legally due; *Clark v. Woods*, 2 Ex. 394; *Skingley v. Surridge*, 11 M. & W. 503; *Hurrell v. Wink*, 8 Taunt. 369; *Sibbald v. Roderick*, 11 A. & E. 38.

The parties interested in imposing and receiving the costs, will do well to consider whether any fees not legally chargeable are included therein.

I notice that in this case the constable who executed the search warrant was the prosecutor of the charge on which the defendant was convicted, and the person to whom the

costs were ordered to be paid; and that he was also the constable to whom the execution of the distress warrant was entrusted, and who afterwards executed the warrant of commitment.

My conclusion is, that the prisoner must be remanded.

Prisoner remanded.

G. A. B.

[COMMON PLEAS DIVISION.]

REGINA V. ANDREWS.

[CASE RESERVED.]

Criminal law—Evidence, admissibility of—Accomplice—Corroborative evidence.

The prisoner was indicted for unlawfully using an instrument on J. L., with intent to procure a miscarriage. J. L. was called for the prosecution to prove the charge, and in cross-examination denied that she had told H. A., H. R., and M. T. that before the prisoner had operated on her she had been operated on by Dr. B. for the purpose of procuring a miscarriage. H. A., H. R. and M. T. were called for the defence, and swore that J. L. had so told them. Dr. B. was then called by the Crown, and he swore that he had not operated on J. L.

Held, that the evidence of Dr. B. was properly admitted; but in any event the prisoner's case was not so affected by the evidence as to warrant a reversal of the conviction, even if the evidence were not strictly admissible.

The question whether or not a Judge, in charging a jury, should or not caution them that the evidence of an accomplice should be corroborated, is not a matter for a Court to review on a case reserved, for it is not a question of law but of practice, though a practice which should not be omitted.

Regina v. Stubbs, 7 Cox. C. C. 48, and *Regina v. Beckwith*, 8 C. P. 277, followed.

The prisoner was tried before Rose, J., and a jury, at Toronto, at the Winter Sittings of the Court of Oyer and Terminer, on an indictment charging him, in various counts, with intent to procure an abortion on one Jennie Leslie by the use of instruments.

The facts, so far as material, are set out in the judgment.

The prisoner was convicted; but sentence was stayed pending the opinion of the Justices of the Common Pleas Division of the High Court, on a case reserved for their consideration by the learned Judge.

During Easter Sittings, May 27, 1886, the case was argued.

Osler, Q.C., for the prisoner. The evidence of Dr. Bogart was improperly received. It was not relevant to the subject matter of the indictment, but was merely collateral. It was not admissible at any stage of the case, and particularly in rebuttal: *Regina v. Whelan*, 8 Ir. R. Q. B. D. 314, *Beemer v. Kerr*, 23 U. C. R. 557; *McCulloch v. Gore District Mutual Fire Ins. Co.*, 34 U. C. R. 384; *Regina v. McIlroy*, 15 C. P. 116; *Taylor on Evidence*, 8th ed., p. 1232. The second point taken is, there was misdirection in not telling the jury that the evidence of an accomplice should have been corroborated. The charge may be strictly correct. The authorities say that a conviction may take place on the evidence of an accomplice, but at the same time it is laid down that it is the safer course and the practice to tell the jury that there should be some corroborative evidence; and while therefore a charge cannot, as a matter of strict law, be said to be wrong, the judge should never omit to tell the jury that it is not safe to convict in the absence of corroborative evidence.

McMahon, Q. C., contra. It is not necessary to consider the second objection, as it was in fact abandoned by the other side. The last case on the subject clearly lays down the law that corroborative evidence is not essential: *Regina v. Gallagher*, 15 Cox 291; but in any event the point is of no importance, as there was ample corroborative evidence. The first point is the only one that remains open. The evidence was clearly material and relevant, and it was evidence that could only be given by the prosecution when the evidence given by the defence rendered it necessary. He referred to *Regina v. Whelan*, 8 Ir. R. Q. B. D. 314, 316-7; *Taylor on Evidence*, 8th ed., sec. 359; *Shaw v.*

Beck, 8 Ex. 392, 396 ; *Briggs v. Ainsworth*, 2 Moo. A. R. 168.

June 26, 1886. CAMERON, C.J.—The case reserved by my learned brother Rose for the consideration of the Justices of the Common Pleas Division of the High Court of Justice, presents two questions for determination.

The first is, was the evidence of Dr. Bogart, a witness called on the behalf of the prosecution, after the evidence for the prisoner had been given, properly admitted, under the following circumstances:

The prisoner was indicted for unlawfully using an instrument upon one Jennie Leslie with intent to procure the miscarriage of the said Jennie Leslie. She was called on behalf of the prosecution in support of the charge ; and on her cross-examination by the prisoner's counsel, swore that she had not stated to Harriet Armstrong, Harriet Roberts, and Minnie Taylor, that before the prisoner had operated upon her she had been operated upon for the purpose of procuring a miscarriage by Dr. Bogart.

Harriet Armstrong, Harriet Roberts, and Minnie Taylor, were called as witnesses on behalf of the prisoner, and swore that she had so stated to them. Then Dr. Bogart was called on behalf of the prosecution, and gave evidence that he had not operated upon Jennie Leslie as Harriet Armstrong, Harriet Roberts, and Minnie Taylor had sworn Jennie Leslie had said he had done.

This evidence of Dr. Bogart was objected to as inadmissible at any stage of the trial, and particularly in reply.

Jennie Leslie's statement that Dr. Bogart had not operated upon her, was not open to contradiction at all unless the fact of Dr. Bogart operating upon her was relevant to the charge in the indictment as affecting the prisoner.

This was very distinctly laid down eighty years ago by the Court of Queen's Bench in England, and has been regarded as the undoubted rule of law ever since : *Spenceley qui tam v. De Willott*, 7 East 108.

The statute 32 & 33 Vic. ch. 29, sec. 69, (D) while it permits evidence that a witness has made a different statement when he denies or does not distinctly admit that he made such statement, makes the relevancy of the statement to the matter in issue, a prerequisite of admitting evidence of the alleged statement having been made.

In the present case it was a matter that was relevant to the subject matter of the indictment.

The charge consisted of two parts—the use of the instrument which would be criminal or innocent according to the object with which it had been used; and second, the intent or object of the prisoner in using the instrument. If to procure the expulsion of a dead foetus, the continuance of which in the womb would be dangerous to the woman's life or health, its removal would be an innocent or proper act. If used with intent to remove a supposed foetus capable of becoming a living child, the use of the instrument would be criminal. If Dr. Bogart had operated before, there might have existed a foetus, the removal of which would have been innocent. It was, therefore, a matter pertinent to the issue to ascertain whether or not Dr. Bogart had in fact operated upon Jennie Leslie as she was said to have stated he had done. Till evidence of her alleged statement was given, there was no ground on which the prosecution could properly introduce the evidence of Dr. Bogart, who would not appear to have any more connection with the case than any other medical man. But when he was by the evidence brought forward by the prisoner connected with the subject matter of the charge, his evidence was properly admissible in reply. But if the statement made by Jennie Leslie on oath that she had not stated to the defendant's witnesses that Dr. Bogart had operated upon her was, when contradicted, a matter affecting her credibility, an issue was presented as to whether she had made the statement or not, and then it was competent to the prosecution to support her statement by evidence that might directly or more

remotely tend thereto. That Dr. Bogart had not operated upon her, would not of course shew that she had not told the defendant's witnesses that Dr. Bogart had operated upon her, for she might have told a falsehood. But if Dr. Bogart had not in fact operated upon her, there was less probability that she had told the defendant's witnesses that he had done so, there being no apparent motive for telling such an untruth.

It would thus be a matter relevant to the issue as to whether Jennie Leslie had made the disputed statement to the defendant's witnesses to enquire whether Dr. Bogart had operated upon her, and his evidence was admissible to show that he had not.

I presume there can be no doubt that it was competent to the prosecution to have called any witness that might have been present at the conversation at which the defendant's witnesses alleged Jennie Leslie made the statement, to prove that she did not make such statement. If so, it becomes a question of relevancy. And it appears to me the fact deposed to by Dr. Bogart was relevant, though remotely so, to the issue whether or not the witness Jennie Leslie did state that Dr. Bogart had operated upon her.

In one aspect of the case it was not material or relevant what Jennie Leslie said in reference to Dr. Bogart.

The crime charged against the prisoner is not that he caused a miscarriage, but that he used an instrument upon Jennie Leslie with intent to do so; and, if so used, the offence was completed whether Jennie Leslie was pregnant or not, and her evidence went to establish that charge. So the prisoner might well have been found guilty, even if it had been true that Dr. Bogart had operated upon her with the same object. It is only upon the supposition that the fœtus was dead, and that the prisoner knew this, that his use of the instrument could be held to have been innocent. If then the statement that Dr. Bogart had operated was collateral, and not relevant to the issue, the evidence given to prove Jennie Leslie had made the statement ought not to have been allowed; but being allowed, it was competent

to the court to permit the prosecution to give any evidence that would serve to shew the fact was contrary to what the witness had stated, and displace any inference of the prisoner's innocence that might be drawn from the statement made by Jennie Leslie when not under oath.

Now it is competent for the prosecution by the leave of the court under section 68 of the Act 32 & 33 Vic. ch. 29 (D.), to shew that a witness has made at other times a statement inconsistent with his testimony given at the trial. The court in such a case, however, should admit the contradiction with great caution, as a person hostile to the accused might say things falsely against him that he would not have the courage to swear to, and the statement made by the witness not under oath might influence the jury to convict against the sworn testimony of the witness if there were any other evidence, no matter how slight, that the court would be bound to submit to the jury.

Assuming that the evidence of Dr Bogart in the present case was not strictly admissible, it does not follow that the conviction of the prisoner should on that account be reversed. There seems to be considerable latitude allowed to a judge in permitting evidence to be given.

In *Rex v. Oldroyd*, R. & R. 88, where a witness, whose name was on the back of an indictment for murder, was not called by the Crown but was called by direction of the judge in deference to the practice then prevailing that a witness whose name was on the indictment, and had been examined by the grand jury, should be called, gave evidence at variance with her deposition before the coroner, the judge directed the deposition to be read, and directed the jury that the witness's testimony was not to be relied on, and left the matter to the jury upon the other evidence. It was held at a meeting of all the judges that the course pursued by the judge was right, and there being evidence to sustain the conviction, it was sustained.

And in the case of *Margaret Tinckler*, East P. C. 354, cited in *Rex v. Oldroyd*, it was held that where declarations made by the deceased were admitted in evidence, which,

when made, owing to the deceased not having the immediate fear of death before her, could not properly be given in evidence, such admission of these declarations, with other like declarations to the same effect, properly admitted, would not render the conviction void, or entitle the prisoner to a stay of execution.

This case is thus referred to in *Rex v. Oldroyd*. "The case of Margaret Tinckler was mentioned; where the Judges determined that although evidence had been received which was not strictly admissible, yet the case appearing clear against the prisoner without that evidence, it was not a reason to stay the execution. And the Judges upon the present occasion, seemed all to agree to that doctrine, where the case was otherwise clear; but seemed to think this case could hardly have fallen within the rule if the evidence of the mother's deposition, to impeach her credit, had been held inadmissible."

The latter observation, if, in our opinion, the evidence of Dr. Bogart was improperly admitted, and had any important bearing upon the guilt or innocence of the prisoner, would show the conviction could not be allowed to stand; but I am of opinion the evidence was admissible, and properly admitted; and if improperly admitted, it had no important bearing upon the issue.

The case of the *Queen v. Whelan*, 8 Ir. R. Q. B. D. 314, is rather against the contention of Mr Osler. It is a clear authority for the position that any one who was present, at the alleged conversation between Jennie Leslie and Harriet Armstrong or the other witnesses called to contradict her statement could have been called to support her, and the evidence rejected in the case was clearly collateral. Boyd, a witness, was cross-examined as to a conversation he had with a police constable named Byrne, in which it was alleged he stated he did not know the persons who attacked the car, as they were masked. Boyd denied having made any such statement. The constable was called, and said he had made the statement, and on cross-examination stated he had made a report of the conversa-

tion to sub-inspectors, his superior officers. The Crown proposed to call the sub-inspectors to examine them as to Byrne's statement that he had reported to them his conversation with Boyd. The Chief Justice refused to admit the evidence. Whether Byrne had reported or not was not relevant, and was collateral to the fact of the conversation being as he stated. If he had reported the conversation the report would corroborate his own belief the conversation was as reported; but if his report was silent as to the conversation, it would only show he was mistaken as to having reported it, which would not be a circumstance to impeach his testimony. To permit a further enquiry in such case might lead to an endless prolongation of the enquiry and a multiplication of issues. For, assuming the report to the inspectors had been oral, they might have reported the conversation to some one else differently from what they swore it was, and then the fact of their having so reported would have to be investigated, and the actual issue raised by the indictment would not be reached till a number of matters had been enquired into that had no direct bearing upon that issue.

I am of opinion that the prisoner's case was not so affected by Dr Bogart's evidence as to warrant a reversal of his conviction, even if his evidence were not strictly admissible; and so the conviction must be confirmed, notwithstanding the objection.

The other point reserved is, was the omission of the Judge to tell the jury that the evidence of the accomplice, Jennie Leslie, required to be corroborated such an omission as entitles the prisoner to a reversal of the conviction? Mr. Osler admitted upon the authorities that he could not contend that it was.

The case of *Regina v. Beckwith*, 8 C. P. 277, is an express decision on the point, shewing that Mr Osler's concession was properly made; and *Regina v. Stubbs*, 7 Cox. C. C. 48, is an authority that precludes the Justices of this Court on a case reserved from entertaining such a ground; it being there held that whether the judge cautions

the jury or not is not a matter for the court to review, as it is not a question of law but one of mere practice, a practice, however, that the case of the *Queen v. Beckwith* shews ought not to be omitted.

In the present case there was, I think, an abundance of corroborative evidence, and so there was no necessity for the caution.

The conviction must therefore be affirmed.

GALT and ROSE, JJ., concurred.

Conviction affirmed.

[COMMON PLEAS DIVISION.]

PALMBY V. MCCLEARY.

Seduction—Evidence—Admission of defendant—Excessive damages.

In an action of seduction the only evidence was that of the plaintiff, the father of the seduced girl, and the defendant, the girl having died shortly after the birth of the child. The plaintiff stated that the defendant had admitted that he had seduced the girl, and asked what the case could be settled for. The defendant denied that he was the father of the child, or that he had made any such admission: that he had heard L. spoken of as the father of the child. He admitted having asked what the case could be settled for, but that he said so because he heard plaintiff was asking \$1,000, and he wished to know what it could be settled for: that he did not do so with a view to any one but merely out of curiosity. The jury found for the plaintiff with \$750.

Held, that there was sufficient evidence to go to the jury in support of the plaintiff's case; and that the damages, under the circumstances, were not excessive.

THIS was an action for seduction of the plaintiff's daughter.

The cause was tried at London, before O'Connor, J., and a jury, at the Spring Assizes of 1886, when a verdict was given in favour of the plaintiff for \$750.

The facts so far as material, are set out in the judgment.

In Easter sittings, *W. R. Meredith*, Q.C., obtained an order *nisi* to set aside the verdict entered for the plaintiff and to enter a verdict for the defendant.

During the same sittings May 22, 1886, *W. R. Meredith*, Q. C., supported the motion and referred to *Westacott v. Powell*, 2 E. & A. 525; *Ryan v. Miller*, 21 U. C. R. 202, 22 U. C. R. 87; *Kimball v. Smith*, 5 U. C. R. 32; *Revill v. Satterfit*, Holt N. P. Cas. 451; *Evans v. Watt*, 2 O. R. 166, 173; *Thomas v. Morgan*, 2 C. M. & R. 496; *Greenleaf* on Evidence, 14th ed., sec. 192; *Wagman v. Hilliard*, 7 Bing. 101.

Bartram, (of London) contra.

June 26, 1886. GALT, J.—There is no doubt that the evidence is unsatisfactory being composed of a distinct assertion on the part of the plaintiff of an admission of guilt by the defendant, and an equally positive denial by the latter. The unfortunate girl was not a witness, having died a few hours after the birth of the child

The question was entirely for the jury as stated to them by the learned Judge; and, in my opinion, the evidence preponderated in favour of the plaintiff.

The unfortunate girl had been in the service of the defendant, who is a married man with a family, for nearly three years. She was only eighteen at the time of her death.

According to the evidence of the plaintiff, as soon as he heard of the situation in which his daughter was, he sent for her, and she came home. This was on the 13th July. The next morning he met the defendant. "I spoke first. I said, 'Well Bill, this is a rare affair.' He said, 'But it can't be helped Tom.' He said, 'I wish some one would shoot me.'" The witness then stated they both began to cry. "Q. You were both crying? A. Yes, and he asked me what would settle it, and I told him \$500 without going to Court. Q. What did he say to that? A. Well, he agreed to pay it."

This is the plaintiff's statement of what took place at the first meeting.

The defendant denied this positively, but the concluding portion of his re-examination might well induce the jury to discredit him. I set the evidence out: Q. "At the time you first saw Mr. Palmby, had you heard anybody's name connected with this matter? A. Yes. Q. Had you heard anybody's name connected with this, when you saw Palmby for the first time? A. Yes, I heard young Lee had connection with her through the neighbours, but nothing definite. Q. Do you mean you heard his name in connection with the matter? A. Yes. Q. That is in connection with being the father of the child? A. Yes. Q. Where had Lee been living? A. He worked for me; he came there in October I think it was. Q. Why did you speak to this man in the way you did about the matter? A. I heard he wanted \$1,000, and I asked him, to find out what he wanted. Q. With a view to whom? A. With a view to no one in particular, just wanted to know for my own curiosity."

After this evidence I am not surprised the jury accepted the statement made by the plaintiff, as to the admission made by the defendant.

It is most incredible that a man who had been acquainted with the plaintiff for years and in whose service the unfortunate girl was ruined, could have been speaking the truth when he referred to his conversation with the unhappy father in the manner he represents himself to have done.

Mr. Meredith urged strongly that owing to the death of the girl, there was no evidence to fix the defendant with the paternity of the child.

The case of *Revill v. Satterfit*, Holt's N. P. Cases, p. 451, shews that it is not necessary to sustain the action that the daughter should be produced as a witness at the trial. In that case the only witness was a younger daughter of the plaintiff, who proved the acknowledgment of the defendant that he had seduced her sister, and that he was the father of the child she had borne. The mother of the child was not examined as a witness.

In the present case, if the jury believed the statement made by the plaintiff of what took place between himself and the defendant when they first met, they could not, in my opinion, have arrived at any other conclusion than that the defendant admitted he had seduced the girl.

If they believed that the defendant expressed a wish that some one would shoot him, and that he shed tears on considering the position in which the unfortunate girl was placed, and drew the inference therefrom that he was guilty of her destruction, I do not think we can say their judgment was wrong.

As to the question of damages it was one entirely for the jury, and if they were satisfied that the defendant (more especially bearing in mind his connection with the plaintiff as the master of the girl) was the author of all the trouble and sorrow brought on the plaintiff, we cannot say they have erred.

CAMERON, C.J.—I concur ; and will only add briefly my reasons. It is clear anything said by the defendant in reference to his intercourse or illicit connection with the plaintiff's daughter, would be admissible against him. If admissible, it is because it has a bearing directly upon the question at issue. In cases where a principal acts through an agent, he will be bound by his admissions, though personally he knows nothing about that which he admits.

The admissibility of admissions, does not depend upon the knowledge of their truth possessed by the party making them. So in the present case the defendant might not know positively that he was the father of the illegitimate child of the plaintiff's daughter, but he could know whether it was possible or probable that he was ; and he may have obtained information from the girl herself as to the fact, which information he was at liberty to treat and use as personal knowledge ; and when he does so use it and acting upon it makes an admission that goes to support and prove the issue, the jury, taking all the circumstances into consideration, may attach just so much weight to that ad-

mission as in their judgment seems right. There is nothing in the nature of this action to interfere with the ordinary rules of evidence; and the jury is just as competent as the court to understand that although the defendant had connection with the plaintiff's daughter, he might not be the father of the child if she had connection with any other man.

It is possible to imagine circumstances under which the defendant could know to a moral certainty that he was the father of the child. For instance, if he and the girl lived on an island, uninhabited by any but themselves, and he nor she never left the island from the time of their first illicit intercourse until the birth of the child, could there be any room to doubt the paternity of the child? Would an admission by him of the above facts leave any doubt in the minds of a jury that the defendant was the putative father? If not, the value of the admission depends upon the circumstances, and it is impossible to say in the present case that the admission sworn to have been made by the defendant does not amply support the verdict and leaves no room for the court to interfere therewith.

ROSE, J., concurred.

Order discharged, with costs.

[COMMON PLEAS DIVISION.]

ROAN V. KRONSBEGIN.

Lease for life—Statute of limitations.

Mrs. H., the owner of lot 13, built a house thereon, but which on a survey made by a surveyor, B., was found to have encroached on lot 12, owned by R., seven and a half inches, whereupon the following agreement was entered into: "It is hereby agreed between R. and Mrs. H. that the line as surveyed between the lots of the above parties on Cherry street by Mrs. B. is correct; but that the said Mrs. H. be permitted to occupy her house during her life, and not be compelled to remove the same, notwithstanding a portion of it is on the land of said R.; but that after the death of the said Mrs. H., said R. may claim the whole of his said lot; and that in the meantime said R. shall occupy his said lot up to the said line in rear of the said house." The defendant had purchased from M. to whom Mrs. H. had sold some 12 years prior to the trial, which took place in the spring of 1886, M. at the time being aware of the agreement, but of which defendant when he bought had no notice. The defendant moved a fence, which plaintiff had erected in rear of the house in accordance with B's survey, in a line with the house, and also veneered the house with brick so as to cause it to encroach one and a half inches further on plaintiff's lot. Mrs. H. died within ten years before action commenced, which was brought to recover that part of lot 12 encroached on by defendant.

Held, that the plaintiff was entitled to recover, for that the agreement must be construed as a demise to Mrs. H. for life of that portion of lot 12 covered by the house, and not merely a license to occupy the same, so that the right of entry of the plaintiff, who claimed under R., did not accrue until Mrs. H.'s death, and therefore plaintiff having brought his action within ten years of Mrs. H.'s death, was not barred by the Statute of Limitations.

It was objected that the plaintiff must fail under the registry laws, because the grant to Mrs. H. it appeared had not been registered, and defendant bought in ignorance of plaintiff's rights; but, *Held*, that the registry laws did not affect the matter, for as defendant bought lot 13 and not 12, the instrument relating to lot 12 would not properly be registered on lot 13.

Held, also, that the agreement signed by Mrs. H. recognizing the line run by B. as the true boundary between the lots, relieved the plaintiff from doing more than shewing where that line ran, and imposed on defendant, who claimed by mesne conveyance from Mrs. H., the burden of shewing that such line was incorrect.

Per ROSE, J.—The plaintiff was clearly entitled to recover as to the one and a half inches; but as to the seven and a half inches, though in doubt, be concurred in the judgment of the Court.

THE plaintiff brought ejectment to recover about seven inches and a half of land, part of lot number 12 on the west side of Cherry Street, in the city of Hamilton, from the defendant, the owner of the adjoining lot on the west, being lot number 13.

The cause was tried before Galt, J., without a jury, at Hamilton at the Winter Assizes of 1886.

The paper title of lot 12 was proved to be in the plaintiff, and of lot 13 in the defendant.

By the evidence it appeared that previous to the year 1851 Jane Hart, one of the defendant's predecessors in title to lot 13, built upon the front of the lot on Cherry street a house which, upon a subsequent survey of lot 12 by one Blythe, a Provincial Land Surveyor, was shown to have over-reached seven inches and a half on lot 12, if that survey was correctly performed ; and the plaintiff and the said Jane Hart, in consequence of that survey, entered into the following agreement :

" It is this day agreed between Anthony Roan and Mrs Jane Hart that the line as surveyed between the lots of the above parties on Cherry street by Mr Blythe is correct, but that the said Mrs Hart be permitted to occupy her house during her life, and not be compelled to remove the same, notwithstanding a portion of it is on the land of said Roan ; but that after the death of the said Mrs. Hart said Roan may claim the whole of his said lot ; and that in the meantime said Roan shall occupy his said lot up to the said line in the rear of the said house.

" Witness our hand and seal the 26th September, 1851,

ANTHONY ROAN, L. S.

Witness :

her

EDWARD AMBROSE,

JANE [X] HART, L. S."

mark.

The defendant purchased the land previously owned by Mrs. Hart from one Murphy to whom Mrs. Hart sold some ten or twelve years before the trial, which took place in the spring of 1886. Murphy at the time he purchased knew of the above agreement between the plaintiff and Mrs. Hart. The defendant when he bought had not notice of this agreement, and he moved the fence which plaintiff had erected in the rear of the house on Blythe's line to the east in a line with the house, and made an alteration in the house by veneering it with brick, so as to encroach on the plaintiff beyond the line of the house, as it stood before, about an inch and a half. Mrs. Hart died within ten years after action brought.

At the trial the learned Judge directed judgment to be entered for the plaintiff for seven inches and a half to the rear of the house, on the ground that by the evidence it appeared that from 1851, after the agreement was signed, until the defendant moved the fence to the east, the plaintiff had acquired title by possession, whether the land was part of 12 or 13 ; but as to the portion of the land claimed by the plaintiff, on which a part of the defendant's house stood, he held as the defendant was not aware of the agreement between Mrs Hart and the plaintiff, he could not decide against the defendant as there was no evidence which clearly and accurately defined the boundary of lot 12.

In Easter sittings, *Carscallen*, on behalf of the plaintiff, moved on notice to set aside the latter part of the judgment and enter judgment for the portion of lot 12, defined by Blythe's survey, covered by the defendant's house, as well as the portion in the rear, with full costs of suit.

During the same sittings, *Carscallen* supported the motion and referred to *Martin v. Weld*, 19 U. C. R. 631; *Iler v. Nolan*, 21 U. C. R. 309; *McGregor v. Keiller*, 9 O. R. 677; *Bell v. Howard*, 6 C. P. 292; *Dennison v. Chew*, 5 O. S. 161; *Doe dem McDonald v. Rattray*, 7 U. C. R. 321.

Robertson, Q. C., contra, referred to *Brooks v. Conley*, 8 O. R. 549.

June 26, 1886. CAMERON, C. J.—The right of the plaintiff depends upon the effect to be given to the agreement entered into between the plaintiff and Mrs. Hart. If that agreement must be construed, as the plaintiff contends, as constituting a demise or grant to Mrs. Hart, of the portion of lot 12, according to Blythe's survey covered by the house, for life, she having died within ten years, then the plaintiff is entitled to have his motion granted. But if that agreement is, as the defendant contends, a mere license to occupy, and at most constitutes a tenancy at will, the

plaintiff's title to the part of lot 12 covered by the house is barred by the Statute of Limitations.

I am of opinion the plaintiff's contention is entitled to prevail, and that the operation of the agreement was to constitute Mrs. Hart a tenant for life, and the plaintiff's right of entry did not accrue till her death, which being within ten years, the Statute of Limitations has not barred his right to maintain this action. It is clear it was the intention of the parties it should so operate, and it would seem upon authority that a license to occupy for a term of years, may be treated as a demise or lease.

In *Bacon's Abridgment*, vol. iv., p. 816, I find this statement in reference to the words that will be sufficient to create a demise for years : "Here it may be laid down for a rule, that whatever words are sufficient to explain the intent of the parties, that one shall divest himself of the possession and the other come into it for a determinate time, such words, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years, as effectually as if the most proper and pertinent words had been made use of for that purpose * * So, if one only license another to enjoy such a house or land till such a time, this amounts to a present and certain lease or interest for that time, and may be pleaded as such, though it may be also pleaded as a license ; and if it be pleaded as a lease for years and traversed, the lessee may give the license in evidence to prove it."

With respect to a grant, the same author lays it down in vol. iv., p. 76 : "Here it may be observed, that, in many cases, without express words, the law creates a good grant ; because it is the design of the law to render all contracts binding and effectual so far as the intention of the parties may be gathered from the deed, and such interpretation is made strongest against the grantor, because he is presumed to receive a valuable consideration for what he parts with."

The authorities in the Courts of this Province are not uniform as to what constitutes sufficient words in an instrument under seal to create an estate for life.

In *Hall v. Hall*, 15 U. C. R. 637, the circumstances were near enough to those of the present case to make the principle applied there applicable to this case. The head note of the case is as follows: "A. died, leaving the plaintiff, his widow, and the defendant his heir-at-law. The plaintiff being in possession of the property, the defendant executed the following instrument under seal. Know ye, all men, that I, John Grantham Hall, * * do bind myself, my heirs, executors, and assignees, in the sum of three hundred pounds, * * to let my mother Leah Hall retain quiet and peaceable possession of the lot of land now in her possession, the same being fifty acres, more or less, for the term of her natural life." Held, a lease for life, and that plaintiff might maintain ejectment.

Sir John Robinson, C. J., in delivering judgment said, at p. 639: "There can be no doubt that if the plaintiff were now in possession under this instrument, and the defendant were endeavouring to turn her out, he must fail, for he would not be allowed to recover in ejectment in the face of his solemn deed executed by himself. As in the case of *Right ex dem Green v. Proctor*, 4 Burr. 2208, it would be held that he could not recover against his own covenant. Then the only question there can be in this case arises from the fact that Mrs Hall is not here defending the possession merely under that instrument, but is seeking to recover under it as a plaintiff in ejectment. I have doubted whether it would be sufficient for that purpose, but my opinion now is, that it is sufficient."

This case may not be readily reconciled with the reasoning in *Wilmot v. Larabee*, 7 C. P. 407, where it was held to the creation of a life estate livery of seisin was necessary, Chief Justice Draper adopting the language: "In all cases where livery of seisin is requisite and is not made, there doth pass no estate, but an estate at will at the most." And, "a delivery of the deed, even upon the land,

unless delivered in the name of seisin of the land, will not operate as livery of seisin. And where the party seized in fee simple, being on the land, demised to the plaintiff for life, but there was no other livery of seisin, it was held this was no good lease, and *Sharp v. Sharp*, Cro. Eliz. 482, and *Sharp's Case*, 6 Co. 26, 3 Co. R. 308, were referred to as confirmatory of the doctrine; and there it was said the words: 'I do here demise unto you my house for the term of your life,' constitute a good beginning, and will avail if he makes an actual livery accordingly, but without livery it amounts to a lease at will."

The instrument under consideration did not profess to give any term, and so on the facts the case is distinguishable from the present case.

In *Nicholson v. Dillabough*, 21 U. C. R. 591, it was held the words, "doth quit claim," were sufficient to convey the legal title by the one who held it. This case was decided in 1862, and in 1867 *Acre v. Livingstone*, 26 U. C. R. 282, was determined, and therein it was held the words, "remised, released, and forever quit claimed," were inoperative to pass an estate in fee, the releasee being only a tenant at sufferance, and the statute 14 & 15 Vic. ch. 7, enacting that all corporeal tenements and hereditaments, as regards the immediate freehold, should be deemed to lie in grant as well as in livery, had only the effect of enabling terms which would have passed incorporeal to pass corporeal hereditaments..

In *Spears v. Miller*, 32 C. P. 661, Armour, J., held that the words demise and lease were apt to convey a life estate. He reviews these cases, points out their discordance, and that they are practically not distinguishable, and intimates that he would, if necessary, follow *Nicholson v. Dillabough* in preference to *Acre v. Livingstone* and *Cameron v. Gunn*, 25 U. C. R. 77.

It seems to me that the decision in the present case must depend upon the proper effect to be given to the words used in the instrument signed by the plaintiff and Mrs. Hart: "It is agreed * * that the said

Mrs. Hart be permitted to occupy her house during her life, and not be compelled to remove the same, notwithstanding a portion of it is on the land of the said Roan." Are the words "permitted to occupy" equivalent to "*grant*," or "*demise*" or "*lease*?" If they are, then an estate for life was granted by Roan to Mrs. Hart. If they are not, a mere tenancy at will or license of occupation was created. In the former case the plaintiff could not have brought ejectment before the death of Mrs. Hart, and is entitled to succeed to the extent prayed for by his motion. In the latter the Statute of Limitations bars his claim. In *Shove v. Pincke*, 5 T. R. 124, the words "limit and appoint" were held to operate as a grant, the intention of the parties being that the deed should operate as an appointment to uses, and in *Roe dem Wilkinson, v. Tranmer* 2 Wils. 75, Wills, C. J., said, at p. 78: "Although formerly, according to some of the old cases, the mode or form of a conveyance was held material, yet in later times, where the intent appears that the land shall pass, it has been ruled otherwise, and, certainly, it is more considerable to make the intent good in passing the estate if, by any legal means, it may be done, than by considering the *manner* of passing it to disappoint the intent and principal thing *which* was to pass the land."

Adopting this rule for guidance, to give effect to the intent where it is possible to do so, should be the aim of courts. Nothing can be more repugnant to common sense and reason than to defeat the object of the parties to a contract or instrument by subtle and refined construction, in furtherance of some ancient rule of law respecting conveyance, which has been disregarded in every day practice, owing to its burdensomeness and want of rational utility.

In this case there can be no shadow of doubt that the parties to the instrument in question fully understood and intended that Mrs. Hart should have the undisturbed occupation of her house during her life. And it would seem irrational to hold that the plaintiff, who intended

this favour to her should be deprived of the right of repossession at her death, when it is equally clear, by the express language of the instrument, both intended he should have it, by reason of his not having resorted to the old practice of livery of *seisin*, now obsolete, and not having used the word grant, which would not have as clearly to their minds expressed their intention as the words used.

I can quite understand that it might be argued that the words used only accorded to Mrs. Hart the right of personal occupation, and that when she ceased to occupy the house and lived elsewhere, the privilege that was yielded to her from the fact that she was a widow and a good neighbour, would cease to exist—a construction the word “grant” would avoid—but that would scarcely be a reasonable construction of the instrument. It was intended during her life, the house should not be disturbed, and that as then situated, she should be allowed to utilize it as to her should seem best for her own benefit during her life. I may refer, with the view of shewing the length Courts go in upholding the intention of parties to contracts, to the recent case of *Houston v. Marquis of Sligo*, 52 L. T. N. S. 870, where it was held the words reserving, “by way of grant and not of reservation,” the right of shooting, &c., in a lease, amounted to a re-grant by the lessee to the lessor of the right of shooting, though the lessee did not actively assume to grant at all. The construction adopted was to give effect to the intention of the parties, as it was to be gathered from the whole instrument.

Mr. Robertson also contended that the plaintiff should fail under the operation of the Registry Laws, as the grant to Mrs. Hart was not registered, and the defendant bought in ignorance of the existence of the plaintiff's right. The fallacy of the contention is made apparent when the fact is remembered that the defendant bought lot 13 and not lot 12, and the instrument related to lot 12 and could not properly have been registered on lot 13.

This brings me to the only remaining point presented by the case, namely, did the plaintiff shew the boundaries of lot 12 with sufficient certainty? I am of opinion the agreement signed by Mrs. Hart, recognizing the line run by the surveyor Blythe as the true boundary line between her land and the plaintiff's, relieved the plaintiff from doing more than to shew where that line ran, and imposed upon the defendant, who claimed by *mesne* conveyance under Mrs. Hart, the burden of shewing such line was incorrect.

The case cited by Mr. Carscallen of *Iler v. Nolan*, 21 U. C. R. 314, I think sustains this view, if authority can be needed for a position that appears so reasonable.

The plaintiff's motion to enter judgment for him according to the line run by Blythe should be allowed with costs.

ROSE, J.—I think it is clear that the plaintiff is entitled to recover for the inch and a half that the brick veneer encroaches upon his land.

I am not equally clear that it was the intention of the plaintiff that the license or agreement to use the land covered by the house was more than a personal license, *i. e.*, a concession to Mrs. Hart personally, and that it was intended that it should avail to any successor to the title.

If, however, she had in her life-time leased the house for say six months, it would seem a somewhat strained construction to say that the agreement did not contemplate such a change of possession.

On the whole, therefore, I feel constrained to concur in judgment as pronounced by the learned Chief Justice.

GALT, J., concurred with CAMERON, C. J.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

SCOUGALL V. STAPLETON.

Malicious prosecution—Evidence—Taking legal advice, stating whole facts—Magistrate consulting County Attorney—Admissibility of evidence—Deposition.

In an action for malicious prosecution, it appeared that the plaintiff's father sold a buggy to B. for \$115, to be made in two payments of \$58 and \$57 respectively, and until paid the title and right of property were to remain in the vendor. Before the purchase money was paid B. sold the buggy to defendant, a livery stable keeper. The plaintiff's father, on hearing of this, directed the plaintiff to go and take it from defendant, which he did, informing those at defendant's place that plaintiff could be seen at an hotel named. The defendant, on his return, went and saw the plaintiff, who told him he was acting under instructions from his father, who claimed to be the owner of the buggy, but, notwithstanding, the defendant caused the plaintiff to be arrested for larceny, and he was committed for trial, and was subsequently tried and acquitted. The jury found for the plaintiff.

Held, on the evidence, the verdict could not be interfered with.

The defendant set up that before causing the arrest he consulted a lawyer, but the jury found that the plaintiff did not give a full and true account of the case.

Held, that this ground failed.

Evidence was offered that the magistrate, against whom there was no charge, had, before acting, consulted the county attorney, which was rejected.

Held, that the rejection was proper.

An objection was taken to the charge, as being adverse.

Held, that the charge could not be complained of here, for to give effect to the objection would be to compel the Judge to submit the case to the jury, leaving them to apply the evidence without any assistance from him, which was not the practice here.

At the close of the defence, the plaintiff's counsel, without objection, put in the defendant's examination before trial. The plaintiff's counsel, in addressing the jury, read a portion thereof; and the learned Judge, in his charge, read other portions.

Held, there could be no objection to the learned Judge reading such other portions, as they were properly in evidence.

ACTION for malicious prosecution.

The cause was tried before Cameron, C. J., and a jury, at Cobourg, at the Spring Assizes of 1886.

The jury found a verdict in favour of the plaintiff for the sum of \$150.

In Easter Sittings, *G. T. Blackstock* obtained an order *nisi*, to set aside the verdict entered for the plaintiff, and to enter a verdict for the defendant, or for a new trial.

During same sittings, May 26, 1886, *G. T. Blackstock* supported the order, and referred to *Cross v. Richardson*, 13 C. P. 433.

Wallace Nesbitt, contra, referred to *Abrath v. North Eastern R. W. Co.* 11 Q. B. D. 441, 453; *Grand Trunk R. W. Co. v. Rosenberger*, 9 S. C. R. 311.

June 26, 1886. GALT, J.—I have read the evidence and the charge of the learned Chief Justice, and the result is that in my opinion the verdict of the jury is sustained by the evidence.

The facts may be briefly stated as follows:

The father of the plaintiff had sold a buggy to a person of the name of McBean, about the end of August, 1885. McBean was to pay \$115 for the buggy, by two payments of \$58 and \$57 respectively, and until they were paid "the title and the right to the property for which the notes were given," were to remain in the vendor. In October, 1885, the defendant purchased the buggy together with a horse and harness for \$100. The father of the plaintiff having heard that the buggy was in possession of the defendant directed the plaintiff to go to the premises of the defendant, who is a livery stable keeper, and bring it away. Accordingly on the afternoon of that day, the plaintiff went in company with his father and James Cockburn and took possession of the buggy. There were two persons in the service of the defendant who were present when this was done, and in answer to the remonstrance of one of them, of the name of Tweedle, the plaintiff and Cockburn took the buggy away, the plaintiff telling Tweedle that the defendant could see him at the Clarke House. This taking was done without any pretence of concealment. The defendant returned shortly afterwards, and upon hearing what had taken place, went to the Clarke House and saw the plaintiff.

I have no doubt from the evidence of the defendant himself, that the plaintiff told him he was acting under instructions from his father, and that his father claimed to be the owner of the buggy.

Notwithstanding this, the defendant laid an information before a magistrate against the plaintiff for larceny, and had him arrested. He was subsequently committed for trial, which took place before Clarke, County Judge, and acquitted.

It appears from the evidence that before the committal by the magistrate, but whether before or after the information was laid is not very clear, the defendant consulted a professional gentleman in Colborne, as to what it was proper for him to do.

One ground of defence is that he was acting under professional advice, and consequently was not liable to an action.

This defence of course depends on whether he gave a full and true statement of the case to his legal adviser. This point was very thoroughly argued at the trial; but the jury by their verdict have found that he had not done so, the learned Chief Justice having expressly told them that if he had he was entitled to an acquittal.

It appears that the magistrate on the enquiry before him refused to receive any evidence for the defence; and that he had consulted the county attorney as to his proper course.

One objection taken by Mr. Blackstock is that the learned Chief Justice erred in refusing to receive evidence of the opinion given by the county attorney.

In my opinion the learned Chief Justice was entirely right. There is no charge against the magistrate, and although I entertain no doubt he acted erroneously in the present case, it is a matter of no consequence whether he did so under legal advice or not.

The principal argument urged by Mr. Blackstock before us was against the charge of the learned Chief Justice as being adverse to the defendant.

To give effect to such an objection in any case would be in reality to say that the practice of our courts should be assimilated to that which prevails in some of the courts in

the United States, where I believe the Judge simply submits certain questions to the jury, leaving them to apply the evidence without any assistance from the Court; but especially in a case like the present where it is the duty of the Judge to decide on the all important question of "want of reasonable and probable cause;" but where such decision must be based on the findings of the jury, unless the Judge chooses to act on his own judgment, it appears to me essential that the Judge should call the attention of the jury to the special circumstances, and afford them every assistance in his power.

There is another objection urged, that the learned Chief Justice read the deposition of the defendant to the jury, Mr. Blackstock contending that it was not properly admissible. The evidence shows that at the close of the defendant's case, Mr. Nesbitt said, "I put in the deposition." The Chief Justice "I do not think you asked Stapleton about it." Henry Stapleton is called by Mr. Nesbitt. "That is your deposition? Yes." The deposition was then filed, no objection being made.

If Mr. Blackstock had objected to the filing of the deposition on the ground that the case was closed, it would have been a question whether the Chief Justice would allow the plaintiff's counsel to file it at that stage, but no objection was taken, and it was received. It was not then read to the jury. In his address to the jury, Mr. Nesbitt read a small portion to them. In his charge the learned Chief Justice called their attention to other portions. This is now complained of, Mr. Blackstock contending that such portion only as was read by Mr. Nesbitt was in evidence. He relied on the case *Cross v. Richardson*, 13 C. P. 433.

That case is very different from the present. It was an action for libel, and the plaintiff's counsel had neither filed or read the paper complained of, so that in truth there was no evidence before the jury, and moreover the learned Judge refused to exercise his discretion by positively admitting it, but allowed the plaintiff's counsel

to put it in, expressly reserving leave to the defendant to move for a nonsuit. In that now before us, the deposition was filed and proved without objection, and consequently was in evidence.

It is quite true that such portions only of the deposition as are read to the jury are in evidence before them; but it was quite competent for the learned counsel to read the whole or for the learned Judge to do so, otherwise what is the use of filing the paper at all.

Mr. Blackstock, in his carefully considered argument, cited no authority for such a proposition, and I certainly am not aware of any.

I understand the rule to be that if a case depend, as for example an action of libel, on the contents of a written instrument, such paper must be filed and read to the jury; but if a paper is filed simply as an exhibit either party may read and comment on it, and of course the learned Judge may do the same as it is in evidence before him, but the jury can know nothing of the contents beyond what are brought under their notice.

The rule must be discharged, with costs.

CAMERON, C. J., and ROSE, J., concurred.

Rule discharged.

[CHANCERY DIVISION.]

KENNEDY ET AL. V. THE CORPORATION OF THE CITY OF
TORONTO ET AL.

Crown lands—Patent subject to condition—Trust—Crown's rights—Private Act—Provincial Legislature—Intra vires—Ordinance lands—"Sell, lease, or otherwise dispose of"—Interpretation.

Certain Ordinance land vested in the Crown was, in 1858, patented to the corporation of the city of T., with the following clause in the patent: "Provided always, and this grant is subject to the following conditions, viz., that (the land) * * shall be dedicated by the said corporation, and by them maintained for the purpose of a public park for the use, benefit, and recreation of the inhabitants of the said city of T., for all time to come" * * . The corporation of T., in 1876, obtained from the Ontario Legislature an Act empowering them "to lease, sell, or otherwise dispose of" the said land, and one of their committees transferred it to another to use as a cattle market, receiving a yearly rent therefor which they applied to a park fund as provided by the Act giving the power to sell, &c.

In an action by a ratepayer to prevent the land being used as a cattle market, and more money being spent on it for that purpose, in which it was contended that the land was granted upon a condition under which the Crown might retake it, and that the Act of the Provincial Legislature was *ultra vires* in dealing with it. It was

Held, on demurrer, that the words in the patent "Provided always and this grant is subject to the following conditions," did not create a condition annexed to the estate granted, but a trust was created the same as if the words used had been "upon the following trusts," and that by the grant the grantors parted with all their estate and interest: that the matter came within sub-sec. 13 of sec. 92 B. N. A. Act, "Property and Civil rights in the Province," and the Provincial Legislature was the proper one to legislate on the subject, and the Act was not *ultra vires*.

Held, also, that the words "otherwise dispose of," when read with the rest of the Act covered the mode of using the property adopted, viz., as a cattle market, and the demurrer was allowed, with costs.

THIS was a demurrer to the plaintiffs' statement of claim in an action brought by David Kennedy and Francis B. Morrow, who sued on behalf of themselves and all other ratepayers of the city of Toronto against the Corporation of the City of Toronto and William H. Howland the Mayor thereof.

The material parts of the statement of claim and demurrer are fully set out in the judgment.

The demurrer was argued on June 23rd, 1886, before Ferguson, J.

Robinson, Q. C., and *McWilliams*, for the demurrer. The property in question was Ordnance land and came to the city under the patent set out in the statement of claim. The corporation of the city have different committees. The Walks and Gardens Committee, under whose control all parks come, arranged with the Markets and Health Committee to transfer the property in question to the latter for 21 years at \$800 a year rent. Then the corporation petitioned the Ontario Legislature and obtained the Act 39 Vic. c. 62, (O.), giving them power "to sell, lease, or otherwise dispose of" the property. The question now is: Is what the two committees, or rather the corporation, have done justified under the statute? [FERGUSON, J.—What is the meaning of the words "to dispose of?"] The plaintiffs' contention is, that they mean "to part with *to some one else*," but *Latham* in his dictionary says they mean "to apply to any purpose." The derivation of the word "dispose" is *dis*, apart, and *ponere*, to place, and the corporation have set the property apart for the cattle market as they are now using it. The Imperial Dictionary gives the definition, "to determine the condition," and "apply to a particular purpose," and *Webster* says, "to assign to a service or use." The plaintiffs also contend that the statute obtained from the Ontario Legislature was *ultra vires*. The property in question was Ordnance land, and came from the Imperial Government to the Government of the old Province of Canada under 19 Vic. c. 45, s. 6, 2nd schedule, and was vested in the then Province subject to the Public Lands Act, 16 Vic. c. 159. Then Confederation took place in 1867, and although sec. 108 of the B. N. A. Act, and No. 9 of Schedule 3 appended thereto make provision for Ordnance lands, still they do not apply to this property, which had been parted with and granted to the corporation, and so ceased to be Ordnance land as far back as 1858. The Ontario Legislature was the proper legislative body to apply to. It was a matter of "property and civil rights" in this Province, subject to a condition subsequent, or rather a trust, although

the plaintiffs may contend that the patent granted a conditional estate from the Dominion, and that it could not be interfered with by a Provincial Legislature. They referred to *The Mayor, &c., of Fredericton v. The Queen*, 3 S. C. R. 505.

McCarthy, Q. C., and Maclaren contra. The plaintiffs' position is to resist the further proposed expenditure on this cattle market. The defendants have not availed themselves of the provisions of their special Act. It is a *quasi* private Act upon the petition and representation of the city, and must be interpreted so as not to allow the city to impose on the Legislature and most strongly against those promoting it. The only powers given are "to sell, lease, or otherwise dispose of." The defendants do not contend that they have sold or leased—then: What is the meaning of the words "to dispose of?" They may mean several things in a general way, but their meaning should be by the court confined by the words preceding, to *ejusdem generis*. In *Severn v. The Queen*, 2 S. C. R. 70, it was held that "saloon, tavern, auctioneer, and 'other licenses' did not extend to licenses on brewers or 'other licenses,'" and thus the meaning was confined by the preceding words *ejusdem generis*. The meaning of disposition should be confined to "disposal, alienation, a giving away or giving over to another:" see Imperial Dictionary. The transfer from one committee to another was not covered and was not intended to be covered by the language of the Act. Not having "sold, leased, or otherwise disposed of" they cannot hold the property freed from the trust, and if they use it as a cattle market they do violence to the grant in depriving the citizens of a park and to the statute in not procuring the proceeds for a park fund. But the Act itself is *ultra vires*. The property was originally Ordnance land and is covered by the words in No. 9, schedule 3, British North America Act. Being Ordnance land—Had the Crown any possible interest in it at the time of Confederation? Could it revert? The Crown certainly had an interest and it passed by the British North America Act to the Dominion and

not the Province, and the Provincial Legislature had no power to legislate in the premises. Suppose the property was leased then, who would be entitled to the reversion? Clearly the Dominion. If the city acted in such a manner that the Dominion became entitled to have the land revert the Provincial Legislature could not legislate that right away. The land was granted to the city with a proviso that it be dedicated by the latter as a public park. The record shews that it was never so dedicated. A condition may be annexed to every species of estate: 2 *Cruise's Digest*, par. 9. In *Jessup v. The Grand Trunk R. W. Co.*, 7 A. R. 128, it was held that the company were not bound to maintain a station for all time to come, but if they ceased to do so it appeared the land would revert. "To dispose of" means to get rid of. See also *Witham v. Vane*, 44 L. T. N. S. 718; *In re Peck and the Corporation of Galt*, 46 U. C. R. 211 at 218; 4 *Cruise's Digest* 354. As to legislative powers see British North America Act sec. 91. As to grants on condition, 2 *Dillon's* on Corporations, 3rd ed. par. 632. As to conditions precedent and subsequent, *Roberts v. Brett*, 11 H. L. C. 337. If words have acquired a technical meaning that meaning must be given to them: *Attorney General v. The Queen Insurance Co.*, 3 App. Cas. 1100. See *Maxwell* on the Interpretation of Statutes, 2nd ed. 405; *Severn v. The Queen*, 2 S. C. R. at 96, 140 and 141; *Regina v. Taylor*, 36 U. C. R. 197, 198; *Angers v. The Queen Insurance Co.*, 22 L. C. Jurist 311; *Elston v. Shilling*, 42 N. Y. R. (App.) (Hand 3) 79; *Crocker v. Waine*, 5 B. & S. 715; *Attorney General v. Middleton*, 3 H. & N. 141; *Stevenson v. Glover*, 1 C. B. 460. As to the test for an Act of the Provincial Legislature: *Russell v. The Queen*, 7 App. Cas. 836.

E. F. B. Johnston for the Attorney-General of Ontario. If there has been no sale, lease, or other disposition, the validity of the Act is not called in question. If there was no condition in the patent then it is a matter of property and civil rights. Trusts between private individuals are different from trusts on property for public use, for in the

latter case there is not necessarily a reverter even for non-user or misuser. The corporation here have used the property even if they have misused it, and the Crown would not take unless the object became impossible: *Dillon* on Corporations, 2nd ed. 619; *Barclay v. Howell's Lessee* 6 Peters, U. S. S. C. 498; *Williams v. The First Presbyterian Society in Cincinnati*, 1 Ohio S. R. N. S. 478; *Webb v. Moler*, 8 Ohio, 548.

Robinson, Q. C., in reply. The preamble of the Act should be read as part of it: *Regina v. Washington*, 46 U. C. R. 230. In *Oliver v. Hyman*, 30 U. C. R. 517, it was held that "other disposition" meant "alienation," but that was a case as to inspection of hides, and it would have been absurd to have held that the hides *must* be inspected before being tanned into leather, for the inspection was only a preliminary to putting the hides on the market. "Other disposition" means do what a person pleases with the object. If the Act is *intra vires*, full power is given to the city to do as it pleases. The Provincial Legislature has the right to take away from the citizens their right to restrain the corporation spending their money wrongfully on the property: conditions of the kind in question are clearly trusts: *Lewin* on Trusts, 8th ed., 140, 284; *Easterbrooks v. Tillinghast*, 5 Grey (Mass.) 17; *Perry* on Trusts, 2nd ed., s. 121.

McCarthy, Q. C., in reply to Mr. *Johnston*. If the Crown retakes the property in cases where the object has become impossible as the object here might become impossible, the Crown has an estate in the property. The condition is an estate: *Sheppard's Touchstone* 120.

June 29, 1886. FERGUSON, J.—The plaintiffs by their statement of claim say that they are ratepayers of the city of Toronto, and are owners of real estate in the said city assessed against them respectively as owners thereof, and that they are liable to pay on such assessments all taxes legally imposed in respect thereof, and that they sue in this action on behalf of themselves and all other rate-

payers of the said city of Toronto; that the defendants, the corporation, is a municipal corporation duly incorporated, and that the defendant, W. H. Howland, is the Mayor of the said city. That by patent from the Crown, bearing date the 21st day of October, 1858, certain lands were granted to the said corporation, and that the title of the said city thereto is derived under the said patent. The plaintiffs then set forth the contents of the patent, which so far as material is as follows: "Know ye that we of our special grace, certain knowledge and mere motion have given and granted, and by these presents do give and grant unto the Mayor, Aldermen, and Common Council of the city of Toronto, their successors and assigns for ever, all and singular those certain parcels or tracts of land situate, lying and being within the liberties of the city of Toronto aforesaid, being composed of parts of the Military Reserve within the said liberties, and which said parcels or tracts may be otherwise known as follows:" Then follows a long description by metes and bounds of one of the parcels, and the words, "Subject to any rights which the Ontario, Simcoe, and Huron Railway have acquired therein: containing by admeasurement about twenty-two and one-half acres over and above the land required for the continuation of Adelaide, King, Wellington, and Tecumseth streets." Then follows a description by metes and bounds of a second parcel of land containing, as is stated, about thirty-three and one-half acres, followed by the words: "Together with all the woods and waters thereon lying and being under the reservations, limitations and conditions hereinafter expressed:"

"To have and to hold the said parcels or tracts of land hereby given and granted unto the said Mayor, Alderman, and Commonalty of the city of Toronto, their successors and assigns forever, saving, nevertheless, to us, our heirs and successors, all mines of gold and silver that shall or may be hereafter found on any part of the said parcels or tracts of land hereby given and granted as aforesaid."

Then follows a provision that no part of the lands granted be within any reservation theretofore made and marked out by the Surveyor General of woods, or his lawful deputy, in which case the grant for such part of the lands as should upon a survey thereof being made be found within any such reservation should be null and void, any thing in the grant contained to the contrary notwithstanding. Then follows this provision: "Provided always, and this grant is subject to the following conditions viz.: that the piece of land firstly above described and not less than twenty acres of the piece or parcel of land secondly above described shall be dedicated by the said Mayor, and Aldermen and Commonalty of the city of Toronto, and by them maintained for the purposes of a public park for the use, benefit, and recreation of the inhabitants of the said city of Toronto for all time to come, and that the piece of land lying between King street and Wellington street, parcel of the land secondly above described; shall form a part of the said twenty acres so dedicated, and further, that park gates shall be placed at the east and west sides of the said last mentioned piece of land where King street intersects the same. And that public roads be laid out and maintained by the said Mayor, Aldermen, and Commonalty of the city of Toronto on the east and west sides thereof respectively not less than one chain in width.

" And provided further that the said Mayor, Aldermen, and Commonalty of the city of Toronto shall for all time to come find and provide in and upon some part or parts of the said parcel of land herein secondly described, sufficient space to the extent of twenty acres at least for the accommodation and purposes of the exhibition of the Provincial Agricultural Association of Upper Canada, which said twenty acres may be composed of or embraced in the portion of said last mentioned parcel of land to be dedicated as a park as aforesaid, and shall embrace the portions of ground on which are now erected the buildings used by and in the Exhibition of the said Association. Given under * * * ."

The statement of claim then proceeds as follows: On the 7th day of July, 1873, the council of the said corporation adopted the report of the Standing Committee of the said council on Public Walks and Gardens, to wit: "Your committee having had a conference with the committee on Public Markets in respect of providing a suitable location for the cattle market have agreed to recommend that a lease be granted to the Market committee for the purpose stated, of that portion of Walks and Gardens bounded on the north by Wellington avenue, on the west by a point distant from Strachan avenue 746 feet, on the south by the Northern Railway fence and along said fence to a sharp point, thence northwesterly to the foot of Tecumseth street and still further in the same direction to the place of beginning." The committee on Public Markets pay therefor to the credit of Walks and Gardens fund the annual rental of \$800 for a period of twenty-one years, in all of which your committee request the concurrence of the council," and on the same day the said council passed a by-law locating the cattle market on said lands, which are part of the same lands as those firstly described in the patent.

That the cattle market of the said city was moved to said site, and the city claim to have expended a large sum of money thereon, to wit, about \$20,000 in the years 1874, 1875, and 1876, and since that time the said sum of \$800 per annum of the revenues of the committee on Public Markets has been placed to the credit of the Walks and Gardens fund of the said city. That in the year 1876 the defendants, the Corporation, presented a petition to the Legislature of the Province of Ontario for power to sell, lease, or otherwise dispose of the lands firstly described in the patent, and that the substance of such petition is set forth in the Act of the Legislature passed in the 39th year of Her Majesty's reign, chaptered 62. That in and by the said Act, to which for further certainty the plaintiffs crave leave to refer, the said Legislature assumed to confer power and authority upon the said corporation to sell,

lease, or otherwise dispose of the lands firstly described in the said patent in the words following: "The said Corporation of the city of Toronto shall have the same power to sell, lease, or otherwise dispose of the lands in the preamble described or any part or parcel thereof, as any person has with regard to the lands of which he is seized in fee simple absolute, and all sales, leases, or other dispositions thereof heretofore made by the said corporation shall be, and be deemed to have been, valid, notwithstanding anything in the said patent contained: Provided that the proceeds of any such sale, lease, or other disposition shall form part of the Walks and Gardens fund of the said corporation, and shall be used and applied only in the acquisition and maintenance of public parks, squares and gardens for the use of the citizens of Toronto:" That the said corporation claims that by virtue of the premises the said corporation has the right to use and maintain the said lands for the purposes of a cattle market as aforesaid. That the said corporation, by and through the said council, propose and intend to expend the further sum of \$10,000 in making improvements in the buildings aforesaid for the purpose of said cattle market, and to assess the property of the plaintiffs and the said other ratepayers of the said city for the purpose of collecting the same, and to levy and and collect the same from the plaintiffs and said other ratepayers as appears by a resolution of the said council passed on the 3rd day of May, 1886, and that the defendant William H. Howland, as Mayor as aforesaid, threatens and intends to sign all cheques to enable the said Corporation to expend the said moneys on said buildings for the purposes aforesaid.

The plaintiffs then submit that the said Act of the said Legislature is *ultra vires* of the said Legislature, and that the said Legislature had no power or authority to relieve the said corporation from the effect of the provisions and conditions in the said patent contained: and that even if the said Act is *intra vires* of the said Legislature the said corporation had not invoked or availed itself of the

powers the said Act contained, that there has been no sale, lease, or other disposition of the lands enclosed as aforesaid within the meaning of the said Act of the Legislature: that the said lands are still held by the said corporation, and that so long as the said lands are held by the said corporation they must be held for the purposes of a public park for the use, benefit, and recreation of the inhabitants of the said city. The plaintiffs further submit that any expenditure of the moneys of the said corporation upon the said enclosed lands for purposes other than for a public park as aforesaid is illegal: that the expenditure of the said moneys on said buildings as aforesaid, will, if permitted, be altogether foreign to and different from the purposes of a public park as aforesaid, and that if the said expenditure is permitted to be made, the plaintiffs and said other ratepayers will be obliged to pay the amount thereof in taxes as aforesaid.

The plaintiffs then ask that it may be declared that such proposed expenditure is illegal upon the grounds aforesaid, and that the defendants may be restrained from expending the same. They also ask for costs and such other relief as may be deemed proper.

To this statement of claim the defendants demur, and say that the same is bad in law, on the ground that under and by virtue of the Municipal Act, and the said statute, and the other proceedings in the statement of claim set out, the defendants were and are authorized to appropriate and use the lands in question therein mentioned as and for the purpose of a cattle market, and have legally exercised such authority, and by virtue of the said Act such appropriation, disposition and use of the said lands for the purpose of a cattle market previously made, was confirmed and made valid and legal, and on other grounds sufficient in law to sustain the demurrer.

The quantity of land in respect of which the dispute is and which is described by metes and bounds in the report of the standing committee on Public Walks and Gardens and set out in the statement of claim, was said on the

argument to be about five acres. This, it was conceded was a portion of what were known as the Ordnance lands, Toronto, which were amongst the military properties of the Crown that were transferred to the then Provincial Government, or rather vested in Her Majesty the Queen for the benefit, use and purposes of the then Province of Canada by the Act 19 Vic. cap. 45. (See second schedule to the Act, "Toronto," "502a, 2r, 1p.") The facts that this transfer was made, and that the lands in question are part of the lands so transferred, or the validity of the transfer were really not disputed, so that I need say nothing more in regard to these.

This Act was passed in the year 1856, and the grant set out in the statement of claim bears date in the year 1858, some two years afterwards. It was conceded that at the time of this grant the lands were the property of the then Province of Canada.

The provision in the grant which gave rise to the dispute, and which appears to have been the reason for the application to the Legislature of the Province of Ontario on the subject, is the one that reads as follows :

" Provided always, and this grant is subject to the following conditions, viz. : That the piece of land firstly above described, and not less than twenty acres of the piece or parcel of land secondly above described, shall be dedicated by the said the Mayor and Aldermen and Commonalty of the city of Toronto, and by them maintained for the purposes of a public park for the use, benefit, and recreation of the inhabitants of the said city of Toronto for all time to come," and what follows these words in regard to streets, gates, and roads.

In one part of the argument it was contended that this constituted a condition precedent. The contention was not, as I thought, persisted in, and I do not see how it could be successful, for in addition to what appears on the face of the patent, it is alleged on the face of the statement of claim, demurred to, that the lands are still held by the corporation, &c., and if this were a condition precedent and

unperformed I do not see how such could be the fact, for a condition precedent must be performed before the estate can commence, but where the effect of a condition is either to enlarge or defeat an estate already created it is a condition subsequent: 2 *Cruise's Dig.* pp. 2 and 3.

It was then contended on the part of the plaintiffs that this was and is a condition subsequent, and on the assumption that it is such a condition the line of argument for the purpose of shewing that the Act of the Legislature of the Province of Ontario mentioned in the pleading was, or is, *ultra vires*, was shortly this: That after the making of the grant the Crown had by reason of the condition a certain right, which upon breach or non-performance of the condition would become a right of entry. Counsel did not in the argument call this right by any technical name, but I apprehend it might properly be called a "possibility" or a "possibility of reverter," a right under the old law releasable to the person whose estate is subject to the condition: See *Sheppard's Touchstone*, 120 and 121, where the subject is treated of. Mr. Leith, however, seems rather to incline to the opinion that such a possibility would fall under the provisions of Consolidated Statutes of Upper Canada cap. 90 the same as R. S. O. cap. 98, sec. 5, and be alienable under the provisions of that section. See *Leith's R. P. Statutes*, vol. 1, pp. 68 and 69. That by the British North America Act, sec. 108 and schedule 3, No. 9, the Ordnance property went to the Dominion Government, and by sec. 91 of the same Act (No. 1) the right of legislating in respect to public property went to the Dominion Parliament. That the right or possibility was "Ordnance property," or a right in respect of Ordnance property, as to which the Parliament of the Dominion alone could legislate, and that the object, or at all events the effect (if the Act were taken to be valid) of the statute passed by the Legislature of Ontario was to change or destroy this right or possibility, which it was intimated had become a right of entry by reason of breach or non-performance of the condition. That the subject was not one that fell under

“property and civil rights in the Province,” or “matters of a merely local or private nature in the Province,” or any of the matters mentioned in sec. 92 of the Act as matters in respect of which the Provincial Legislature was given or had the right to legislate, and that for these reasons the Act of the Legislature referred to was, and is, *ultra vires* and void.

This line of reasoning and argument may be quite logical and as such not subject to objection, yet the result arrived at depends entirely upon the assumption that the provision in the grant constitutes a condition subsequent giving rise to the existence of the possibility or possibility of reverter, and the question arises as to whether or not such is the true meaning of the document in this respect?

The *habendum* is in effect to have and to hold to the corporation, their successors, and assigns forever. Saving nevertheless (Royal metals). The words employed in the proviso are “Provided always, and this grant is subject to the following conditions.”

In *Cruise's Digest*, vol. 4 p. 353 is this passage: “It is said in the *Touchstone*, that although the words proviso *ita quod* and *sub conditione*, are the most proper words to make a condition, yet they had not always that effect, but, frequently served for other purposes: for sometimes they operated as a qualification, or a limitation, and sometimes as a ‘covenant.’” And on page 354 of the same volume it is said that the same words may be construed to operate as a proviso, or a covenant, according to the nature of the transaction.

In the case *Attorney-General v. The Corporation of South Molton*, 14 Beav. at p. 361 the Master of the Rolls said: “This question depends upon whether, according to the true construction of the testator's will, the estate was given upon a trust or upon a condition. It is to be observed that the mere use of the word ‘trust’ or the word ‘condition,’ would not by itself determine either that it is a trust or a condition. To take a very ordinary and simple case: suppose the estate had been given to the

corporation of South Molton, on condition that they would divide the rents into four equal parts of which they were to take one-fourth, It is plain that although the word condition were (*sic*) used, it would be a 'trust,' to divide the estate into fourths, &c."

In *Sugden on Powers*, 7th ed., vol. 1 p. 122, it is said, "and in regard to its being an estate upon condition we may observe that what by the old law was deemed a devise upon condition, would now perhaps, in almost any case be construed a devise in fee upon trust."

In the case *Sohier v. Trinity Church*, 109 Mass. at p. 19, Chapman, C. J., said in speaking of the words "upon condition:" "These words do not always create a condition," and referring to the case *Rawson v. School District of Uxbridge*, 7 Allen 125, which he considered as decisive of the case before him, he said at p. 19, "The purpose for which the property is to be used being in its nature general and public * * as it was in that case, and the language of the deed not indicating an intent that the grant is to be void if the declared purpose is not fulfilled, but rather indicating a trust to be enforced if the grantees shall attempt to violate it."

In *Stanley v. Colt*, 5 Wallace 119, (S. C.,) it was held that the word "provided" though an appropriate word to constitute a common law condition does not invariably and of necessity do so, on the contrary it may give way to the intent of the party as gathered from an examination of the whole instrument and be taken as expressing a limitation on trust, see also *Perry on Trusts*, sec. 121, and cases there referred to for the same principle. See also *Lewin on Trusts*, 8th ed. p. 140, as to conditions being construed as trusts. Many cases were referred to by counsel during the argument which have a bearing on this branch of the present case, but I do not think it necessary further to refer to them.

I think the authorities are abundant to shew that I am not on account of the use of the words "Provided always, and this grant is subject to the following con-

ditions " bound to say that a condition was created and annexed to the estate granted. There is no language in the patent indicating an intent that the grant is to be void if the declared purpose is not fulfilled, and, when I read the whole of the grant as set forth in the statement of claim and see the general and public nature of the purposes for which the property is by the grant to be used, and such directions as are given regarding certain details of user for that purpose, and not a single expression or word, so far as I can perceive, (beyond the words that I have already alluded to) indicating that it was or was considered to be a grant upon a condition and subject to forfeiture of the whole of the land granted, (for I think a forfeiture for breach could be of nothing less), and this for breach of any one or more of the many things mentioned to be performed, and these in respect to different parts of the land, the conclusion at which I arrive is, that a trust was created and not a condition annexed to the estate taken by the grantees, and I think the meaning of the grant is the same as if the words so much discussed had been, *provided always and this grant is upon the following trusts, viz., &c.*

I am of the opinion that by the grant the grantors parted with all estate and interest in the land, and I think what is said in the 8th ed. of *Lewin on Trusts*, p. 284 cap. 13, sec. 22, referred to by Mr. Robinson during the argument applies, and in this view of the case the matter presented by the petition of the corporation to be legislated upon by the Provincial Legislature plainly fell under No. 13 of sec. 92 of the British North America Act: "Property and civil rights in the Province." They did legislate upon it, and passed the Act in question, which I am of the opinion is not *ultra vires*, and for anything that was urged against it, is, I think, constitutional.

For the plaintiffs it was, however, further contended that even assuming that the Act of the Provincial Legislature is perfectly valid and good, yet what has been done with the land, as stated in the pleading demurred to, is not authorized by the Act, as the Act gives power only to "sell, lease,

or otherwise dispose of" the lands, the contention being shortly that what has been done is not a sale, nor is it a lease, and that the words "otherwise dispose" have not in the statute their ordinary signification, but that their meaning is controlled and restricted by the preceding specific words "sell" and "lease," and that no disposition of the property is authorized by the words "otherwise dispose" unless a disposition by way of alienation of the property or some part thereof, because the words "sell" and "lease" are both words that import alienation. In this contention the rule referred to in *Maxwell* on the Interpretation of Statutes, 2nd ed. p. 405, was invoked. The rule, however, is not of universal application. It applies only where the specific words used are of the same nature: *Maxwell*, 413, and the general object of the Act also sometimes requires that the final generic word shall not be restricted in meaning by its predecessors: *Maxwell*, 414. This principle of construction has no application in cases where there is anything to shew that a wider sense was intended: *Maxwell*, 406.

It is then important to examine the Act carefully to see whether or not it contains anything to shew that the wider sense was intended. It was scarcely contended that if this "wider sense" were to be given to the words "or otherwise dispose of" what was done or is being done by the defendants, the corporation, would not be authorized by the statute, and, of course, the provisions of the Municipal Act applicable to the subject.

The power that is given by the statute in question is the same power to sell, lease, or otherwise dispose of the lands or any part or parcel thereof as any person has with regard to lands of which he is seized in fee simple absolute: What was asked for by the petition, as appears by the preamble of the Act, was power to sell, lease or otherwise dispose of the lands "free from the said trust," it being apparently assumed that a trust was declared by the patent. The Act gives the power in regard to then future sales, leases, or other dispositions, and validates the sales,

leases, or other dispositions, if any, theretofore made, and provides for the application of the funds arising upon all such sales, leases, or other dispositions. There is no obligation imposed by the Act upon the corporation to sell, lease, or otherwise dispose of the lands, or any part of them.

The power given is not, as I think, left to depend for its meaning entirely upon the words "sell, lease, or otherwise dispose of." The Legislature used further words, and said that the power they were giving was the same power as any person has with regard to lands of which he is seized in fee simple absolute. It may, of course, be argued that this only means such power as such person so seized has to sell, lease, or otherwise dispose of the land, and that the principle of construction relied on by the plaintiffs would nevertheless apply, but the intention appears to me to be the contrary of this. I cannot but think that the reason for the use of these additional words by the Legislature was to shew that what was intended to be given was an ample power, and such a power as such a person so seized has, in fact, over his lands, the only restriction or limiting of the power being the provision with regard to application of the moneys or funds arising upon sales, leases, or other dispositions of the lands.

I think the mode of stating the power intended to be given, adopted by the Legislature, by comparison as it were with a power known to be ample power, indicates that what was intended to be given was an ample power, and that this, if there were no other reason, prevents the restricting of the meaning to be given to the words "or otherwise dispose of" by the application of the principal of construction on which the plaintiffs rely. These words should I think be read as having their full, and unrestricted meaning, and, if this is done, the acts of the defendants, the corporation, respecting the land in question, of which the plaintiffs complain are I think within the power given to them by the statute, for the words seem to have a very comprehensive meaning when this is unrestricted. It was

not contended before me that there was any violation of the provisions of the Municipal Act, if the statute in question gave the power that I think it did.

My opinion is, for the reasons that I have endeavoured to state, against the contention of the plaintiffs, both as regards the meaning of the patent and the interpretation of the statute as well also as to the validity of the latter.

I think as I have already said, that the patent instead of making the grant subject to the condition contended for by the plaintiffs virtually declares a trust in respect of the lands granted, and that by the grant the Crown parted with all its interest in the lands granted. I think that the Provincial Legislature had legislative jurisdiction, so to speak, over the property and the rights of all parties interested in it and that the act that they passed was not as alleged *ultra vires* and is valid and good, and I think that the Act according to its proper construction authorized the acts of the defendants, the corporation, of which the plaintiffs by their statement complain, they acting within the sphere of their powers under the Municipal Act. And I think the statement of claim discloses no good cause of action. I am of the opinion that the demurrer should be allowed, and it is allowed, with costs.

Judgment accordingly allowing the demurrer, with costs,

G. A. B.

[CHANCERY DIVISION.]

SWEET ET AL. V. PLATT ET AL.

*Will—Devise—Limitation to “offspring”—Life estate of ancestor—
Misrepresentation—Execution of deed without consideration.*

J. P., by his will, provided as follows: “I give and devise to my brother D. P. the * * on which he resides * * to hold the same to the said D. P. for and during his natural life, and after the death of the said D. P. I give and devise the said * * to H. P., second son of said D. P., to be held by the said H. P. for and during his natural life, and if the said H. P. shall leave offspring him surviving, then I give and devise the same to such of his offspring as the said H. P. shall appoint, and in case of no appointment being made by the said H. P. in his lifetime, then I devise the same equally to the children of the said H. P. in fee, and in case the said H. P. shall die without lawful offspring or during his father’s lifetime, then I give and devise the same to * * D. P. and H. P. by conveyances and mortgages dealt with the land as if they were the owners in fee. After several mortgages to one J. E. who was H. P.’s solicitor, were registered against the land, and after D. P.’s death, J. E. having assured H. P. that his (J. E.’s.) title to the land was perfectly good, and that H. P.’s children had no interest in it, persuaded H. P. as a matter of form to execute the power of appointment in favour of L. S. one of his children, and to obtain from L. S. and her husband, without their knowing of the execution of the power of appointment, and on making the same representation and without consideration, a quit claim deed of all their interest in the land. In an action by L. S. and her husband, on discovering their interest, to have the quit claim deed delivered up to be cancelled, and to have it declared that the conveyances and mortgages made by D. P. and H. P. only bound their life estates. It was

Held, that only a life estate was given to H. P. and not an estate in fee tail. If “offspring” is read as “children,” or construed as meaning “issue,” the devise falls within the rule that when words of distribution, together with words which would carry an estate in fee are attached to the gift to the issue, their ancestor takes for life only. Here to the children or issue, in default of appointment, is given expressly an estate in “*in fee*,” and it is distributed to them “equally.”

Held, also, that untrue representations were made which induced the execution of the power of appointment and the transfer of the estate thereunder without consideration; and that the instruments subsequent to the deed of appointment, did not affect the fee simple of the land, and that the operation of the mortgages should be limited to the life estate of H. P. in the land.

THIS was an action brought by Luella Sweet and James Sweet her husband, against John O. Platt and Catherine E. Platt, William J. Eyre and Calista A. Phillips, to set aside a quit claim deed, the execution of which was obtained by misrepresentation.

The plaintiffs’ statement of claim set out the description of the parties to the suit, and that William J. Eyre and

Calista A. Phillips were the executor and executrix of one J. Eyre deceased : that one John Platt was in his lifetime and at the time of his death, the owner of certain land (describing it) worth about \$5,000 : that in his will he made the following devise : " 2. I give and devise to my brother Daniel Platt the * * on which he resides containing 100 acres, to hold the same to the said Daniel Platt, for and during his natural life, and after the death of the said Daniel Platt I give and devise the said farm and land to Homer Platt, second son of said Daniel Platt, to be held by the said Homer Platt for and during his natural life, and if the said Homer Platt shall leave offspring him surviving, then I give and devise the same to such of his offspring as the said Homer Platt shall appoint, and in case of no appointment being made by the said Homer Platt in his lifetime, then I devise the same equally to the children of the said Homer Platt in fee, and in case the said Homer Platt shall die without lawful offspring or during his father's lifetime, then I give and devise the same to the children of my said brother Daniel Platt or their heirs," and died in the year 1846 without having revoked or altered said will, and which said will was duly registered : that the said Homer Platt by indenture dated March 27th, 1861, assumed to convey said land to Daniel Platt, and the said Daniel Platt and Homer Platt assumed to mortgage the same in fee to one John Eyre by indentures dated December 13th, 1862, and November 2nd, 1867, to secure the sums of \$438 and \$32.50 and interest respectively ; that the said Daniel Platt and his wife to bar dower, assumed to convey the said land to John O. Platt, in fee by indenture dated May 29th, 1872 : that the said Homer Platt and John O. Platt by indenture dated November 30th, 1874, assumed to mortgage the said land in fee to John Eyre to secure \$800 and interest, and by indenture dated January 20th, 1877, the said Homer Platt conveyed all his interest in said land to John O. Platt : that the said John O. Platt, on January 20th, 1877, assumed to mortgage the said land to John Eyre for

\$1,500 and interest, and the said John Eyre discharged the first three mortgages before mentioned: that John O. Platt again on December 15th, 1877, assumed to mortgage said land to John Eyre to secure \$600 and interest, and again with his wife to bar dower on November, 9th, 1878, assumed to mortgage said land to said John Eyre to secure \$2,500 and interest: that Daniel Platt died in 1882, leaving several children surviving, of whom Homer Platt was one: that the said Homer Platt by deed of appointment dated November 23rd, 1880, executed his power of appointment over said land in favour of his daughter the plaintiff Luella Sweet, but did not inform either of the plaintiffs of his having done so, and they had no notice or knowledge of the same until just before the commencement of this action: that the said John Eyre had for many years acted as solicitor to and had great influence over the said Homer Platt, who was an illiterate man, and relied greatly on the honesty and integrity of said Eyre: that the said John Eyre, using his said influence over Homer Platt, represented that he had taken the best legal advice to be had, and there was no doubt he had the title in fee to the said land, still to make it quite regular he wanted him to get a quit claim deed signed by the plaintiffs as a mere matter of form, which might save him some expense, and by which the plaintiffs would lose nothing: that he prepared the said deed and procured the said Homer Platt to get the plaintiffs to execute it under his said representations that they had no interest: that the plaintiffs were illiterate people and believed the said representations, and the said Homer Platt having great influence with them they, in ignorance of their interests, executed the same: that the said quit claim deed is dated November 27th, 1880, and purports to be made in consideration of \$100 but the plaintiffs never heard it read, and were ignorant of its contents, and never received any consideration for executing it, and if they had known of their interest they would not have executed it: that by indenture dated November 30th, 1880, the defendant John O. Platt, at the instance of the said Eyre conveyed 48

acres of said land to Catherine E. Platt : that Catherine E. Platt and Homer Platt her husband, by indenture dated December 1st, 1880, assumed to mortgage the said 48 acres to John Eyre to secure \$2,301 : the plaintiffs charged that all the mortgages made to the said John Eyre previous to the date of the deed of appointment, viz., November 23rd, 1880, were mortgages of the life estates only of the said Daniel Platt and Homer Platt, and that the said quit claim deed from the plaintiffs, and the mortgage from Catherine E. Platt and her husband were obtained at the instance and through the influence of the said John Eyre and without consideration : the said John Eyre died in the year 1882 : the defendant John O. Platt after the death of John Eyre, by indenture dated January 26th, 1883, assumed to mortgage in fee 52 acres of the said land to William J. Eyre and Calista A. Eyre (since Calista A. Phillips) as executor and executrix of John Eyre to secure \$1,450, but the plaintiffs charge that no money was advanced, and the same was merely given as renewal of the mortgages from John O. Platt : and the plaintiffs asked to have the deed from them to John O. Platt, dated November 27th, 1880, delivered up to be cancelled, and that it be declared that the other mortgages and conveyances convey no greater interest than the life estates of Homer Platt and Daniel Platt.

The defendants the executors, by their statement of defence denied all fraud, and alleged that the mortgages of December 1st, 1880, and January 28th, 1883, were for valuable consideration, and claimed the benefit of the registry laws.

The defendant Catherine E. Platt, by her statement of claim admitted some of plaintiffs' statement of claim, and as to the remainder, alleged want of personal knowledge, and submitted her interests to the Court, but alleged that the plaintiffs had never applied to her for a release or conveyance of her estate in the said land.

The action was tried and evidence taken at Peterborough, on April 21st, 1886, before Boyd, C., when

J. B. Clarke and *E. B. Stone*, appeared for the plaintiffs.

Moss, Q.C., for the defendants the executors.

Edminson, for Catherine E. Platt.

No one appeared for John O. Platt.

The further hearing of the action was adjourned to Toronto for the argument as to the construction to be put upon the devise in the will of John Platt, and was argued there on June 30th, 1886.

The documents set out in the plaintiffs' statement of claim were produced and on their production their execution was admitted by the defendants, and evidence was given proving the plaintiffs' allegations, with the exception of the fraud.

Moss, Q. C., was first called upon. The will of John Platt gave the land after Daniel's death to Homer in fee simple or fee tail, with power of appointment among his offspring, but by his dealings with it the power of appointment became extinguished, and the title to the land was in John O. Platt absolutely before the execution of the deed of appointment, which did not affect it at all. If it was an estate tail it was barred by his joining in the different deeds and mortgages: *Smith v. Death*, 5 Madd. 371; *Bickley v. Guest*, 1 R. & My. 446; *Brook v. Brook*, 3 Sm. & Gif. 280; *Trust & Loan Co. v. Fraser*, 18 Gr. 19. The first life tenant was protector of the settlement and he joined with the tenant, and so the entail was broken: *Lawlor v. Lawlor*, 10 S. C. R. 194. The power of appointment is limited to the offspring who shall survive him, and he is alive yet, so the plaintiff's appointee may not survive him. The power of appointment is evidently intended to be exercised by will. The deed to the plaintiff is revocable and is not a good appointment. The evidence shews no fiduciary relationship between John Eyre and Homer Platt. The appointment was executed to make John O. Platt's title good, not to give plaintiffs any interest. The whole transaction must be set aside

if any part is, and that will leave the plaintiffs without any *status* to sue. No costs should in any event be given against the executors, as they were obliged to defend to ascertain the facts.

Foster, Q. C., and Clarke. The transaction was for the benefit of the solicitor Eyre, and not John O. Platt. The evidence shews Homer was not on speaking terms with John O., and so would not put himself out to serve him. If the plaintiff Luella Sweet survived her father she would take a part of the land under the terms of the will, even if no appointment was made: at the least she had an expectancy. Homer takes only a life estate under the will, with remainder in fee to the children. There is a power of selection only given to Homer, but the estate comes from the testator. On selection the appointee takes in fee. There is a direct devise to the children if no appointment made. The "offspring" take as purchasers, and there is a devise over if he died without leaving offspring: 2 *Jarman on Wills*, 4th ed., 432; *Hockley v. Mawbey*, 1 Ves. Jr. 143; *Crozier v. Crozier*, 3 Dr. & W. 373; *Kavanagh v. Morland*, Kay, 26. There is no estate tail under *Wild's Case*; *Clifford v. Koe*, 5 App. Cas. 469; *Bowen v. Lewis*, 9 App. Cas. 901. Here there are words of distribution, and the word "equally" is used. *Shelley's Case* does not apply; 2 *Jarman on Wills*, 4th ed., 438; *Roddy v. Fitzgerald*, 6 H. L. C. 823; *Morgan v. Thomas*, 8 Q. B. D. 575; *ib.*, 9 Q. B. D. 643.

Edminson, for Catharine E. Platt, submitted her rights to the Court, but asked costs, as no release or conveyance was ever demanded from her before suit.

Moss, Q. C. Catharine E. Platt is a purchaser for value of her share, as it was given to her in consideration of her responsibility on the mortgage on the whole land, and we should therefore hold her share at least under any circumstances.

July 3, 1886. BOYD, C.—I think that the better construction of this devise is that only a life estate is given

to Homer Platt, and not an estate in fee tail. If "offspring" is to be read "children" that is tolerably plain. Even if it is to be construed as meaning *issue*, the devise will fall within the rule in *Jarman*, 3rd ed., vol. ii., 417, approved of in *Bradley v. Cartwright*, L. R. 2 C. P. 522, that when words of distribution, together with words which would carry an estate in fee are attached to the gift to the issue, the ancestor takes for life only. Here to their children or issue in default of appointment is given expressly an estate "in fee," and it is distributed to them "equally." (See *Cases in 2 Watson's Compendium of Equity*, 299.)

This view of the will determines the case in favour of the plaintiff. Untrue representations were made to her and her father, which induced the execution of the power of appointment, and the transfer of the estate thereunder without consideration.

The whole affair was managed by and in the interest of Mr. Eyre, including the transfer of the forty-eight acres to Mrs. Platt. The result is, that the instruments subsequent to the deed of appointment should be declared not to affect the fee simple of the land; and that the operation of the mortgages should be limited to the life estate of Homer Platt in the land. The plaintiff has sufficient interest in the land to justify this declaration of rights and to prevent further complication of the title. Mrs. Platt should be relieved from the mortgage made by her, and the executors should have a charge by way of mortgage for what is due to Mr. Eyre upon the land, to the extent of the life estate of Homer Platt.

Mr. Eyre being dead, and the charges of *fraud* not being established in its extreme sense, and the executors being compelled to defend by their ignorance of the transaction, I do not think any costs should be awarded to, or for any of the parties.

[COMMON PLEAS DIVISION.]

ARDAGH ET AL. V. THE CORPORATION OF THE CITY OF
TORONTO.

Contract—Written certificate—Final certificate as to completion of work, &c.

The plaintiffs entered into a contract with the defendants to construct a cedar block roadway, &c., according to plans and specifications, and to the direction and satisfaction of the city engineer, &c. Payment was to be made monthly at the rates mentioned in the tender, during the progress of the work, upon the engineer's certificate and that of the chairman of the committee, and until the granting thereof no money was to become due or payable. A drawback of 15 per cent. was to be retained by the corporation until after six months from the time of the final certificate, shewing the satisfactory completion of the work. By the by-law no contractor could demand payment until he should present to the treasurer a certificate from the engineer, &c., stating he had examined, measured and computed the work, and that the same was completed, or that the payment was due on such work, and also stating what the work was on which such money was due; also that every account before being paid should be certified by the engineer, and by the committee under whose authority the work was done; and the treasurer should not pay such accounts unless furnished with the two certificates.

Held, that the required certificate must be in writing.

By the conditions found with the specifications the engineer was the sole judge of the quantity and quality of the work done, and his decision was to be final and conclusive as against the contractor: that monthly payments up to 85 per cent. of the work done should be made, &c., on the measurement of the engineer, such certificates to be binding only as progress certificates, and in no way to affect the final certificate, which should only be given on the whole work being completed and measured up, and at the expiration of six months when a certificate for the balance should be issued by the engineer. Part of the work required to be done by the plaintiffs was the raising and removing of the street railway ties, &c., and replacing same after the grading and ballasting had been completed. The plaintiffs did not replace the ties, &c., as the street railway company elected to do the work themselves, but the plaintiffs sent in their accounts charging therefor as if they had done the work. As to a portion of the work there was no certificate by the engineer that the work was done or that the price was payable therefor; and as to the other portion the acting engineer wrote under the account sent in "allowed one-third of above \$521.66;" and then under this was written "certified for the sum of \$521.66." On the back of the account the engineer subsequently certified that he had examined the account, and that plaintiffs was entitled to recover the sum of \$521.66, which was paid to the plaintiffs. Under this certificate the plaintiffs claimed that they were entitled to recover for the whole work done, as this was the effect of the certificate.

Held, that as to the first-named portion there could be no recovery by reason of the absence of a certificate; and as to the other portion the certificate did not shew that the work was done to the engineer's satisfaction or was completed, or that the payment demanded was due; but at most that one-third of the work was done, and which had been paid for; and therefore nothing was shewn to be due to the plaintiffs.

THIS was an action brought by the plaintiffs against the corporation of the city of Toronto for a sum of money alleged to be due to the plaintiffs on a contract made with the corporation for laying down a cedar block roadway and stone curbing on King street in the said city.

The cause was tried before Galt, J., without a jury, at Toronto, at the Spring Assizes of 1886.

The facts so far as material are set out in the judgment.

The learned judge entered judgment for the plaintiffs, for a portion of the claim.

During Easter sittings, *McWilliams* moved, on notice, to set aside the judgment for the plaintiffs, and to enter judgment for the defendants.

Pearson also moved, on notice, to increase the amount of the plaintiffs' judgment.

During the same sitting, June 2, 1886, *Robinson*, Q. C., and *J. B. Clarke*, supported the defendants, and shewed cause to the plaintiffs' motion. They referred to *Sharpe v. San Paulo R. W. Co.*, L. R. 8 Ch. 597, 612; *Coatsworth v. City of Toronto*, 7 C. P. 490, 8 C. P. 364; *Standing v. London Gas Co.*, 21 U. C. R. 209; *Kempster v. Bank of Montreal*, 32 U. C. R. 87; *Elkins v. Corporation of Bruce*, 30 U. C. R. 48; *O'Brien v. The Queen*, 4 S. C. R. 529; *Jones v. The Queen*, 7 S. C. R. 570, 605-6; *Stevenson v. Watson*, 4 C. P. D. 148; *Rob. & Jos. Dig.* 4171; *Pashby v. Mayor, &c., of Birmingham*, 18 C. B. 2.

Lount, Q. C., and *Pearson*, contra, referred to *Roberts v. Watkins*, 6 C. B. N. S. 592.

June 26, 1886. ROSE, J.—It was not denied that it was necessary for the plaintiffs to produce a certificate to entitle them to recover; but it was contended by counsel for the plaintiffs that an oral certificate of the engineer, that the work was satisfactorily performed, was sufficient; and that whether an oral or written certificate was requisite, the evidence satisfied the requirement.

It seems to me, therefore, that the decision must turn upon the reading of the contract, and that it will not be necessary to review the many cases cited.

On the 10th of January, 1883, the plaintiffs entered into contracts with the defendants to construct a cedar block roadway and stone curbing on King street, between Brock and Simcoe streets, according to plans and specifications and "according to the directions and to the satisfaction of the engineer appointed by the corporation to take charge of the said works."

Payments were to be made at the rates mentioned in the tender, monthly, during the progress of the work "upon the certificate of the said engineer and the chairman of the committee appointed according to the provisions of By-law No. 1076, relative to corporation contracts, which provisions are hereby incorporated with and made part of this agreement. Provided that no money shall become due or payable on this contract until such certificate shall have been granted; and that a drawback of 15 per cent. of the amount appearing by any certificate to be due, shall be retained by the said corporation for six months from *the date of the final certificate shewing* the satisfactory completion of the said works. Provided also, that the said corporation shall not be liable to pay for any work rejected or condemned by the said engineer, or to pay any money upon any certificate until the work so rejected or condemned has been replaced by new material and workmanship to the satisfaction of the engineer, or to pay for any extras not included in the specifications, unless ordered in writing by the said engineer."

The provisions of By-law No. 1076, applicable are secs. 133, 134, and 135.

Section 133. "No contractor or other person engaged on any work for the city shall be paid the compensation allowed him (unless otherwise provided by the contract) or any part thereof, unless at the time of paying the same he shall present to the treasurer a certificate from the city engineer, or person in charge of the city engineer's department, stating that he had *examined, measured and computed the work, and that the same was completed, or that the payment demanded was due on such work*, and also stating what the work was on which such money was due."

Section 134, requires that "every account before being passed shall be certified, firstly by the City Engineer," or other superintending officer ; secondly, by the committee (if any) under whose authority the contract or expenditure was made, this latter certificate being given by or by the order of such committee, or a majority thereof, and signed by the members or by the chairman in their presence ; and such certificate shall also refer in some distinct manner to the by-law or resolution of the council by or under which the expenditure was authorized.

By section 135, the treasurer is directed to "pay no such account unless the same is given to him *with the said two certificates*," &c.

It seems manifest from the above provisions that the certificate required must be in writing.

The general conditions which are found with the specifications, the clauses being numbered in sequence, provide, clause 52, "The term engineer shall apply to the city engineer for the time being, or some other officer or officers appointed by the council to act for him in special or particular cases ; and he or they shall be the *sole judges of the quantity and quality* of the work done ; and his decision thereon shall be final and conclusive as against the contractor," &c.

61. "Monthly payments to the extent of 85 per cent. of the amount of work done and materials delivered each month shall be made about the first week of the following month, on the measurement made by the city engineer or an officer appointed by the council for that purpose, and on the certificate of the said city engineer, or other officer appointed by the council in special cases, as aforesaid, such certificate to be binding only as regards progress, and in no way to affect the final certificate, which *shall only be given on the whole work being completed and measured*, up and at the expiration of six months, *when a certificate for the balance* due will be issued by the city engineer, or other officer appointed by the council in special cases as aforesaid."

It would seem clear from the foregoing the work was to be done to the satisfaction of the acting engineer, whose

duty it was to examine, measure and compute the work, and who was to be the sole judge of the quantity as well as of the quality of the work done, whose decision as to the quantity and quality was to be final and conclusive as against the contractor, and on whose written certificate, stating *either* that he had examined, measured and computed the work, and that the same was completed, *or* that the payment demanded was due on such work, and also stating what the work was on which such money was due, and by the final certificate shewing the balance due, the contractor is entitled to be paid at the rates mentioned in the tender.

The learned judge at the trial held that the engineer had power only to certify as to the work done and amount due for the same at the rates mentioned in the tender; but had no power to interfere with the rates or make deductions from the amount to be paid.

In the view I take of the matter this may be assumed to be so as to the final certificate, which by sec. 61 of the specifications and general conditions is to be given only on the whole work being completed and measured up. If however, the work as completed and measured up was inferior in quality or less in quantity than as originally understood, it may be that under sec. 52 of the specifications and general conditions, and sec. 133 of the by-law, he might in his measurement certify that a less amount had been earned than was claimed.

Assuming, however, in the plaintiffs' favour that upon a certificate by the engineer that certain work had been completed, the plaintiffs were entitled to apply to the treasurer for payment according to the rates mentioned in the tender, let us see what evidence the plaintiffs give as to such certificate?

The difficulty has arisen as to the raising and removing the street railway ties, stringers, and rails, and replacing the same after the grading and ballasting had been completed, as required by sec. 41 of the specifications.

The plaintiffs in fact did not replace the ties, the Street

Railway Company having elected to do such work themselves, but sent in their accounts charging the whole price as if they had done the whole work.

As to the work claimed for from Simcoe to Brock streets, amounting to \$974.80, the acting engineer disallowed the whole claim. The ground is stated on the face of the account; but at the trial the learned Judge found that the disallowance was properly made as the plaintiffs produced no written order directing them to do the work as provided for by the contract.

As no certificate by the engineer either that the work was done or the price was payable has been produced the judgment stands as to that amount.

As to the track between Simcoe and Sherbourne streets, the accounts were made out in the same form, substantially as follows:

"To taking up track on King street block pavement between Simcoe and Sherbourne streets 7,840 lineal feet of single track at 20c.\$1,125 69"

Underneath is written,

"Allowed one-third of the above.....\$521 66"

"Certified for the sum of \$521.66

"E. COATSWORTH,

"Commissioner of Works and Health."

In dealing with the forms I will treat them as if the claims were in one account as I have put them above.

If Mr. Coatsworth (who was the acting engineer after Mr. Brough's death and before Mr. Sproat was appointed) was not empowered to interfere with the price and could only certify to the amount of work done, as was contended by Mr. Lount, must not the above, if taken to be a certificate, be a certificate that only one-third of the work had been done?

Mr. Lount's argument as I noted it was:

"The effect of the certificate is, that we have done all, except putting the track down; we are not bound to put the track down; therefore the effect of the certificate is, that we have done all the work, and are accordingly, under the

contract, entitled to be paid according to the rates found in the tender."

On the back of the account Mr. Sproat certified as follows:

"I hereby certify that the within account is for King street cedar block roadway, Simcoe to Sherbourne streets, which was ordered to be constructed by the council: that I have examined the same; and that Ardagh & Leonard are entitled to receive the sum of \$521.66."

In his evidence he stated that he knew nothing personally as to the facts, Mr. Coatsworth having performed the work prior to his appointment, and that he had certified relying on Mr. Coatsworth's certificate.

Can I say a certificate has been produced shewing that the work has been done to the satisfaction of the acting engineer, that he had examined, measured, and computed the work, and that the same was completed, or a certificate to the effect that the whole payment demanded, and for which action has been brought, is due?

In my opinion the utmost that can be said is that the engineer has certified that one-third of the work claimed to have been done, has been done, and for that one-third the plaintiffs have been paid.

I can see no construction of the contract and certificate upon which I can determine in favour of the plaintiffs' contention; and therefore conclude that the plaintiffs' motion must be dismissed, with costs, and the defendants' be made absolute, with costs: directing judgment to be entered for the defendants dismissing the plaintiffs' action, with costs.

CAMERON, C. J., and GALT, J., concurred.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

ADAMS V. THE CORPORATION OF THE CITY OF TORONTO.

Municipal corporations—Necessarily raising sidewalk—Premises injuriously affected thereby—Arbitration—Compensation—Action.

The corporation of the city of Toronto, in the exercise of its corporate powers, necessarily raised the sidewalk in front of the plaintiff's premises whereby, as was alleged, the plaintiff's premises were injuriously affected, he having had to raise his premises to the level of the sidewalk. In an action to recover the expense occasioned thereby. *Held*, on demurrer, that this was not the subject of an action, but for compensation under the arbitration clauses of the Municipal Act, 1883.

STATEMENT of claim.

1. The plaintiff on the 1st of January, 1884, and before and since said day, was, is, and hath been carrying on the business of a hardware merchant in the city of Toronto at Nos. 502 and 504 Queen street west; and his house and shop were and are his own property occupied by him; and prior to the damages caused, as hereinafter stated, by the action of the defendants, and their officials, officers and servants, the plaintiff was doing a large and profitable business, and had numerous customers, and his house and shop were situated in a convenient and proper position on the street aforesaid, adjacent to the sidewalk which he hath the right to use, and have the advantage for ingress to and egress from his shop and premises aforesaid.

2. The defendants, their officials, officers and servants, by their authority, command and order, contrary to his, the plaintiff's will and desire, and against his interest and proprietary rights as such owner of said house, shop and premises as a merchant, caused on, to-wit, the 1st of May, and before and afterwards, in the year 1884, the sidewalk opposite his shop and premises to be raised two feet above and from its original level and height existing and being when he built his house and shop, and occupied them as a business stand for mercantile pursuits, and have so continued, and do so continue the sidewalk so raised to his great loss in his business, to his great inconvenience,

and to the annoyance and danger of his customers in entering his premises, and to the injury and damage of the foundations of his said shop, caused by the inflow of water from the sidewalk.

3. The defendants and their officials, officers and servants, notwithstanding the plaintiff's continued complaint to them, and his petition for redress and the abatement of said injury and improper elevation of the sidewalk, still continue the said sidewalk in said position and state, and refuse to compensate him for his loss and damages, by reason thereof, and for the consequential damages arising to him therefrom for loss of trade and injury to his shop by an overflow of water and loss of custom and trade.

4. In order to obtain such proper and necessary ingress to and egress from his house, shop and premises, the same hath been taken down and rebuilt on new foundations and timbers, and raised to the level of the present height of the sidewalk, all of which it was necessary to do, at a great expense, exceeding \$500; and that he hath already suffered damages, and continues to suffer great damages by such improper action and continued neglect and omissions of the defendants as aforesaid.

The plaintiff claimed \$500 damages.

The fifth paragraph of the defendants' statement of defence was, that if the plaintiff's land, shop, and premises have been injuriously affected by the raising of the grade and level of the sidewalk in front thereof, and greatly damaged thereby, as in the statement of claim set forth, and the plaintiff is entitled to compensation in respect of the same, which the defendants do not admit, the plaintiff's claim for compensation has never been mutually agreed upon between the plaintiff and the council of the municipal corporation of the city of Toronto, the defendants herein, nor has the same ever been determined by arbitration under the provisions of the Consolidated Municipal Act of 1883, as required by section 436 of the said Act, and the other provisions of the said Act in that behalf; and the defendants submit that by reason of the matters

aforesaid, the plaintiff cannot maintain this action against them in respect of the alleged grievances complained of in his statement of claim, and that no action will lie against the defendants in respect of such matters; and the defendants further submit that the said action should be dismissed with costs.

Demurrer to the fifth paragraph of the statement of defence.

1. That the action and complaint of the plaintiff, as set forth in the statement of claim, is not within the provisions of section 486 of the Consolidated Municipal Act of 1883, nor was he bound to have his damages aforesaid determined under the provisions thereof, or under any section of said Act before the commencement of his said action.

2. That the said section applies to cases where the City Council has entered upon, taken or used real property belonging to owners or occupants, and not to consequential damages arising from the overflow of water, or the stopping of ingress to and egress from premises.

3. That the building of a sidewalk by the defendants as alleged in the plaintiff's statement of claim, so as to prevent the plaintiff's customers from entering his premises, and so as to flood the same or to rot and destroy the timbers thereof, does not amount to entering upon, taking or using his premises by the defendants, but amounts to injury which he has a right to have tried by a Court, and submitted to a jury.

4. That sections 487 and 488 of said Act clearly shew that the preceding section thereof has reference to the entering upon and use by the corporation of real estate, and not to indirect injuries arising from the conduct of of corporated bodies such as are mentioned in the plaintiff's statement of claim.

5. That the said section 486 alludes to the appointment of arbitrators to decide between the owners of the land entered upon, and the city council to fix the damages; but supposing the plaintiff's case to come under this section,

which the plaintiff denies, there is nothing in that section or the following sections to oust the jurisdiction of any Court of law to try the plaintiff's case, the plaintiff in fact having two remedies.

6. That the said fifth paragraph is drawn as a plea in bar of the plaintiffs action, and at the commencement thereof the word "if" is used, admitting that the plaintiff has a cause of action, and then attempts to destroy the same by setting up matter entirely inconsistent with any right of the plaintiff to sustain his action, and is in fact in the alternative.

7. That the said fifth paragraph does not state that the plaintiff's cause of action is one within said section 486 of said Act, nor does it say that the plaintiff refused to refer the same to arbitration, or that the defendants offered to arbitrate on such claim, or that the plaintiff is barred of his common law right of action by said section.

On the 26th March, 1886, the demurrer was argued.

C. Durand, for the plaintiff.

Foster, Q.C., for the defendants.

March, 26, 1886. WILSON, C. J.—I am of opinion this is a case in which the plaintiff should have proceeded for compensation under the Municipal Act of 1883, sec. 486, because the plaintiff's land has been injuriously affected in the due exercise by the municipality of its powers, and in which the compensation awarded will be a final settlement of the plaintiff's ground of complaint.

A cause of action against a municipal corporation for damages, and not for *compensation*, may be maintained when the corporation is acting negligently in doing work in the execution of its powers, and which damage, caused by negligence, may be removed by the corporation afterwards doing the work properly, or by otherwise removing the matter of complaint, and for which the complaining party may bring his action from time to time, so long as the cause of damage is maintained, or left uncorrected, and which should not be continued, and need not be continued.

But here the corporation had the right to level the sidewalk, and they have done their work properly, and they cannot undo their work.

There is nothing the corporation can do to avoid injuriously affecting the property, They have the right to maintain their work just as it is, and they having injuriously affected the plaintiff's property, there can be no continuing cause of action from time to time against the defendants. The plaintiff, if entitled to recover at all, must be entitled to get his claim once for all, that is, in effect *compensation*—a final settlement once and forever. The plaintiff shews he had to raise his building to the level of the sidewalk so that all his damage is over and cured, and his claim is now a matter of compensation only.

I must give judgment for the defendants that this is a case for compensation and not for damages, and I give judgment, as above, for the defendants, with costs.

Judgment for defendants.

[CHANCERY DIVISION.]

MILLETTE V. SABOURIN.

Deed subject to condition of maintenance—Place of maintenance—Refusal of covenantee to leave premises conveyed—Broken condition—Forfeiture.

H. S. by deed dated November 4, 1863, granted his farm and some chattels to his son T. S. in consideration of \$300, "subject to be defeated and rendered null and void upon the non-performance by the said party of the second part of the following condition, or any part thereof, viz., The said party of the second part covenants to feed, clothe, support and maintain the said party of the first part * * during the term of his natural life. * *". T. S. having fulfilled the condition during his lifetime, died on October 5, 1865, leaving a widow and one child. The widow removed from the farm, but offered to take H. S. with her to her father's house, and have him provided for there, or to allow him to go to her brother's house in the same way, both of which offers were declined, and as no maintenance was provided for him by her at the farm he treated the condition as broken, and brought an action of ejectment, and recovered judgment, and conveyed the farm away by deed, and the defendant became the owner by subsequent conveyance. H. S. was subsequently supported, part of the time on the farm, by the defendant, and died in 1880.

In an action of ejectment by the infant daughter of T. S., claiming under the deed to her father against the defendant, it was

Held (affirming the judgment of ARMOUR, J., PROUDFOOT, J., dissenting), that the grantor was not bound to accept the offers made, and that the conditions of the deed were broken and the land forfeited.

Per ARMOUR, J., (at the trial.) The deed must be construed as being made upon condition and as being defeated and rendered void by the non-performance of the covenant. The effect of the covenant is, that H. S. was to be maintained wherever he might choose to live, but he was not bound to go to any place the covenantor or his representatives might require him to go, and he was justified in refusing to accept the offers made.

Per BOYD, C.—The parent who for value purchases the right to support from his son has, if the written instrument is silent on the point, the first and controlling choice as to the place of abode. If the father's wishes are reasonable, having regard to his age and station in life, the Court ought to respect them in preference to the counter propositions of those who are to supply the maintenance. There was here no caprice, no unwarrantable obstinacy in the father's resolve to cling to the homestead, such as should induce the court to disregard the general rule. The result is, that the conditions of the deed were broken and the land forfeited.

Per PROUDFOOT, J.—The life interest of H. S. was not reserved out of the land, it rested solely on the condition, with probably an equitable charge on the land. The condition is to maintain without specification of place: it imposes no personal obligation on the grantee, it may be fulfilled by any one having an interest in the property, and may be performed wherever the grantee or his representative might reasonably offer.

Per FERGUSON, J.—It was a condition annexed to the estate granted, the proper effect of which was that if broken the title would go to the grantor or those claiming from him the reversion in the lands; the grantor was not bound to accept the offer that was made, and there was a breach of the condition, the effect of which was to revest the estate.

THIS was an action of ejectment brought by Lia Millette, an infant, by Rose Charboneau her next friend, against Pierri Sabourin.

The plaintiff's statement of claim set out that she was the only child and sole heiress-at-law of one Thomas Sabourin, and the wife of one Dolphice Millette; that the said Thomas Sabourin died intestate on October 5th, 1865, seized in fee of certain land (describing it) that the defendant was in possession of; and claimed possession and *mesne* profits.

The statement of defence set out that on and previous to November 4th, 1863, one Hyacinthe Sabourin was the owner of the said land, and was the father of the defendant and of Thomas Sabourin, whose heiress-at-law the plaintiff claimed to be; that before the said date the said land was almost in a state of nature with the timber cut, and comparatively valueless, and required labour and money to make it productive: that the said Hyacinthe Sabourin was very old, and to induce his own son Thomas Sabourin to remain at home and cultivate it, made the following agreement: viz., that the said Thomas Sabourin was to remain at home and cultivate and improve the land and maintain the said Hyacinthe Sabourin for life, and after his death bury him according to the rites of the Roman Catholic Church; and the said Hyacinthe Sabourin agreed to assure the said land in such a manner that the same should become the property of the said Thomas Sabourin, after the death of Hyacinthe Sabourin, if the said Thomas Sabourin fulfilled his part of the agreement; but if he failed in performing his part of said agreement, then he should have no claim, but the said Hyacinthe Sabourin should hold the said land as of his original estate: that on or about November 4th, 1863, the said Thomas Sabourin took the said Hyacinthe, who was an illiterate man, to a non-professional man and induced him to sign some instrument without independent advice, by which the plaintiff claims, the said Thomas Sabourin became entitled in fee simple: that within twenty months after

the execution of said instrument, Thomas Sabourin died, leaving a widow and the plaintiff his only child, without having improved said land: that very soon after the death of Thomas Sabourin, his widow and infant daughter abandoned the said land, leaving the said Hyacinthe unprovided for; and the said Hyacinthe Sabourin brought an action of ejectment and recovered judgment, and was put in possession by the sheriff: that the defendant had provided for the said Hyacinthe Sabourin until his death; that the said Hyacinthe Sabourin conveyed the said lands away by deed, dated August 20th, 1867, and the defendant became the owner of the same under deed of December 14th, 1875: and claimed that Thomas Sabourin's interest in said land became forfeited on his death and failure to fulfil the condition or that his deed should be reformed; and further alleged that defendant had made improvements thinking the land was his own.

The action was tried at the Autumn Assizes, held at L'Original, on November 17th, 1885, before Armour, J.,

Butterfield, for the plaintiff.

P. O'Brian, for the defendant.

A copy of the memorial of the deed of November 4th, 1863, between Hyacinthe Sabourin and Thomas Sabourin, was put in at the trial, the consideration and conditions of which are set out in the judgment of Armour, J.

January 16, 1886. ARMOUR, J.—The question in this case turns upon the construction to be given to the deed of the 4th November, 1863, made between Hyacinthe Sabourin of the first part, and Thomas Sabourin of the second part, whereby the said Hyacinthe Sabourin, in consideration of the sum of three hundred dollars of lawful money of Canada, to him in hand, paid by Thomas Sabourin, the receipt whereby is thereby acknowledged, did grant, release, convey, and confirm unto Thomas Sabourin, his heirs and assigns forever, the land in question. To have

and to hold the same with all and singular, the hereditaments and appurtenances thereunto belonging, unto the said Thomas Sabourin and his heirs and assigns forever, in as full, large, and ample a manner as the said Hyacinthe Sabourin might have held the same had the said deed never been executed : and also the following chattel property—viz., two horses, seven head horned cattle, twelve sheep, and five hogs, with all the farming utensils and household furniture then on the premises, all of which real and personal property the said Thomas Sabourin thereby acknowledged to be in full possession, subject, however, to be defeated and rendered null and void upon the non-performance by the said Thomas Sabourin of the following conditions or any part thereof—viz., the said Thomas Sabourin, his heirs and assigns, covenants to feed, clothe, support, and maintain the said Hyacinthe Sabourin in a decent and becoming manner, suitable to his condition in life, for and during the term of his natural life ; and further, the said Thomas Sabourin covenants to have the said Hyacinthe Sabourin decently buried after his death, according to the rights of the Roman Catholic Church.

At the time this deed was executed, Thomas Sabourin was living with his father, Hyacinthe Sabourin, on the land in question, and continued to live thereon and to keep his covenant till his death on October 5th, 1864. Thomas married on the 31st of October, 1863, Rose Rouleau, and a child was born to them on July 29th, 1864, who is the plaintiff in this action.

Upon Thomas's death, his widow went back to live with her father, and took away the personal property, and disposed of it to her own use: she then made an arrangement by which one Pillon was to go and live on the place with Hyacinthe, and feed, clothe, support, and maintain him, which he did for about two months, when he took sick and left.

She then arranged with her father and with her brother that if Hyacinthe would go and live with either of them, that he would feed, clothe, support, and maintain him, but

on making this offer to Hyacinthe, which I find she did, he declined to accept it, and to go and live with either of them. Hyacinthe afterwards brought ejectment against Rose Sabourin and Mary Lia Sabourin, her infant child, the present plaintiff, although not in possession, and recovered a judgment by default against them on the 22nd of March, 1866.

On the 30th of August, 1867, Hyacinthe made a deed of the same land to Hilaire Sawaire upon the same terms as to his support and on the 5th of July, 1875, Hilaire Sawaire made a deed back to Hyacinthe of the same land. On the 5th of July, 1875, Hyacinthe gave a quit claim deed of the same land to Amédé Sabourin, who made a quit claim deed on the 14th December, 1875, to the defendant subject to a condition for the support of Hyacinthe. Hyacinthe died about five years ago.

It might be argued owing to a part of the consideration for the deed of the 4th of November, 1863, being the sum of \$300 which was paid, that the residue of the consideration the covenant should be treated as a mere charge redeemable by the plaintiff, its value being ascertained, but I think I must construe the deed as being made upon condition and as being defeated, and rendered void by the nonperformance of the covenant.

It was no doubt in the contemplation of the parties, although not so expressed in the deed, that Hyacinthe should be fed, clothed, supported, and maintained on the land. See *Pool v. Pool*, 1 Hill, N. Y. 580.

I think, however, the effect of the covenant is, that Hyacinthe was to be fed, clothed, supported, and maintained wherever he might choose to live, but I do not think he was bound to go to any place the covenantor or representatives might require him to go and live, in order to be there supported, and I think, therefore, he was justified in refusing to accept the offer made to him by Rose Sabourin. See *DeCrespigny v. DeCrespigny*, 9 Ex. 192.

I think the recovery in ejectment was of no avail and unnecessary, for Hyacinthe was in possession, and his deed

to Sawaire was a sufficient declaration of his being in for condition broken.

The result of my view is, that the action must be dismissed with costs. I refer to *Goudy v. Goudy*, Wright, R. (Ohio), 410; *Wilson v. Wilson*, 38 Me. 18; *Thomas v. Record*, 47 Me. 500; *Simmonds v. Simmonds*, 3 Met., Mass. 558; *Gray v. Blanshard*, 8 Pick. 284; *Hamilton v. Elliott*, 5 Sergt. & Raw. Penn, 375; *Willard v. Henry*, 2 N. H. 130; *Andrews v. Sewer*, 32 Me. 290.

The action afterwards came on by way of appeal to the Divisional Court, and was argued on February 18th, 1886, before Boyd, C., and Proudfoot and Ferguson, JJ.

Shepley, for the appeal. Hyacinthe Sabourin was not entitled to refuse to leave the place. The widow offered him maintenance, which was all she could do, and he refused it unreasonably. The condition, therefore, has not been broken. The widow was entitled to perform the condition as such right descends to the heirs, besides the heirs are named in the covenant: *Smith's Real and Personal Property*, 3rd ed., 67-68; *Goudy v. Goudy*, Wright, R. (Ohio) 410. The refusal of the old man to be maintained, dispensed with the performance of the condition. See also *De Crespigny v. De Crespigny*, 9 Ex. 192.

The original intention was to live together as one family, but when the son died, the family was broken up, and the old man should have gone to live with the son's widow when she offered to take him.

Moss, Q. C., contra. The evidence shews the farm required working, and if abandoned, would become insufficient as security for the old man's maintenance. He had a right to remain and see it properly worked; *Copeland v. Copeland*, 89 Ind. 29. The father had a right to say where he would reside: *Swainson v. Bentley*, 4 O. R. 572. Neither the widow's father or brother offered to receive and keep the old man, and the widow's offer for them was not sufficient. If he had left the farm, it would be said

he had elected to forego his right to annul the deed, and to rest on being kept by her relatives.

Shepley, in reply. The condition being a condition subsequent, should be strictly construed.

June 16th, 1886. *BOYD, C.*—The father, Hyacinthe Sabourin, made the arrangement with his son Thomas before the latter married, to convey the farm to him on condition that the old man was to be supported for his life by Thomas. The home of the family of which Hyacinthe was then the head, was on this farm, and the family consisted of a sister and Thomas, and besides three brothers of Thomas's, two of them small children. What one would infer from the circumstances seems to be directly proved, viz.: that the arrangement between father and son, though not in terms expressed in the deed, was, that the old man should continue to live on the land and have his support there. The evidence of the defendant is direct upon this point, and he is corroborated by John Rouleau, the uncle of the plaintiff, who recounts what was told him of the family arrangement when he visited the Sabourin family on the homestead before his sister married Thomas.

This then was the state of affairs when Thomas married the mother of the present plaintiff. About a year after marriage Thomas died, and his widow and child forthwith moved away from the farm, and went to live with her father. Some eight or ten days afterwards, her father, Joseph Rouleau and his son John, with several persons in their interest, came to the Sabourin homestead at the widow's instance, and removed a quantity of personal property, a horse, some pigs, and some cattle, which the widow sold for her own benefit. At the time the widow went away, and at the time of this deportation of property, two of the children, brothers of Thomas, were lying sick in the house.

As to the old man, it was about that time arranged with his consent that one Tranchemontagne, a son-in-law, should step into the shoes of the son Thomas, take the land, and keep the old man; but this fell through, owing to

the widow and Tranchemontagne being advised that the claim of the infant girl, the present plaintiff, intervened.

Then, in substitution, the old man assented to one Pillon, nominated by the widow, taking the farm as tenant, and keeping him thereon as one of the terms of the tenancy. That arrangement was acted on for a month and a half, when Pillon fell sick, and in consequence, relinquishep his undertaking.

The widow then (acting throughout as the natural guardian of her child) proposed that her father-in-law should move off the farm and go to live with her father, or, if he preferred it, with her brother. But at this point the old man took his stand, and refused to leave the land unless they dragged him away. One of the witnesses testified as to the old man having spoken roughly and unkindly to his daughter-in-law. It might be that he was exasperated because of her conduct in leaving the house when the sick children were there, and in sending her father and brother afterwards to take off the cattle and other things. It is to be remembered, however, that the agreement was, that he was to be maintained on the place, and he may have had good reasons for refusing to become a member of the family of Joseph or John Rouleau. He had not acted unreasonably with reference to Tranchemontagne or Pillon, and it should not be assumed that he did so as to the Rouleaus. Besides, it was at this time that he offered to commute at the rate of \$88 per year with a cow and three sheep to be furnished to him while he lived. This the widow could not undertake, and no attempt was further made to carry out the provisions of the conveyance as to his maintenance. He elected then to forfeit the land, and unequivocally manifested his intention, as was conceded upon the argument.

The question for decision is, whether the old man had the right to choose the place where he was to be supported, or whether those claiming under the son, were at liberty to consult their own convenience? As between the son Thomas and those claiming under him as volunteers, I

should say that the original agreement as to the place of maintenance being the farm (which would be charged with a lien for the support) ought to prevail. But apart from this, as a proposition of law, the correct conclusion in my opinion is, that the parent who for value purchases the right to support from his son, has, if the written instrument is silent on the point, the first and controlling choice as to the place of abode. If the father's wishes on this head are reasonable, having regard to his age and station in life, the Court ought to respect these in preference to the counterpropositions of those who are to supply the maintenance.

I find no decisions upon this which seems to be a matter of first impression in our Courts. But kindred questions have received much consideration in Scotland, where the enforcement of alimentary provisions between parent and child is of frequent occurrence. The Scottish law is worked out on principles of natural justice. It imposes an obligation on the parent to maintain the child while he is unable to provide for himself, but this obligation shifts as time adds to the strength of the one and the infirmities of the other, so that the child arrived at man's estate is, if competent, required to support the aged parent who needs assistance. The distinction, however, is clearly recognized that, whereas the parent may, as a general rule, provide for the sustenance of the child in the place and manner most convenient for the former; the contrary rule obtains where the child is called upon to support the parent. Thus in *Jackson v. Jackson*, 4 Court of Sessions cases, 188, it was held that the offer of a son to receive his parent into his own house, was no discharge of the obligation to aliment, except, perhaps, when he was totally unable to give a separate maintenance. It is to be noted that the parent's right in this case rested entirely on the natural obligation arising, *ex pietate*, (See *Buis v. Stiven*, 2 Court of Sessions cases, 2nd series, p. 210), and does not apply to cases resting on agreement in which the law is still more favourable to the parent.

Contrast with the case of *Moncrieff v. Fairholm*, Dictionary of Decisions, (Morrison's) Vol. I., p. 454, in which a mother in her contract of marriage with a second husband took him bound to maintain her daughter. The contract provided that he should educate and aliment his wife's daughter suitably. Now, if the matter had rested on natural obligation only, it would have sufficed for the stepfather to have offered to provide for her in his own home, as was held in *Couper v. Riddle*, 44 Scot. Jur. 484, (noted in *Henderson's Dig.*, p. 444, No. 7.) But in the *Moncrieff Case*, the Lords, on the daughter's application, fixed a "liquid sum" for maintenance, and found that it was not a sufficient implement of the obligation that the defender offered to aliment her in his own house with her mother, as was done in bygone days.

The provisions of the Civil Code of Quebec, are very much the same in effect as the decisions of the Scotch law, to which I have referred. See *Articles* 166, 171, and 172.

In all systems of jurisprudence based on the civil law, peculiar privileges attach to alimentary provisions secured by deed or resting on valuable consideration, and especially so when in such circumstances a parent is the one who claims at the hands of a child: *Bell v. Reid*, 22 Scot. L. R. 136; *Muir v. Muir*, 15 L. C. Jur. 309; *Lauzon v. Connoissant*, 5 L. C. Jur. 99; *Séigny v. Crocketiere*, 15 L. C. R. 473; *Civil Code of Louisiana*, Articles 249 and 250. In such cases I regard the fundamental principle of giving a preference to the parent entitled to support, as against the child who is bound to support, as one resting upon the foundation of natural justice, and one that may rightly be applied in the present action, for the benefit of the defendant. I find here no caprice, no unwarrantable obstinacy in the father's resolve to cling to the homestead and live there as against an offer merely to go elsewhere, such as should induce the Court to disregard the general rule. He was not called upon against his will and against the original undertaking, to go off into the family of his daughter-in-law's relations.

If it be that she, in her bereaved condition, was unable to support him on the land, or pay him a proper commutation, the result is, that the conditions of the deed were broken and the land forfeited. I agree in the result of the judgment of Armour, J., and think this application should be dismissed, with costs.

Since writing the foregoing reasons for my judgment, I have found a recognition of the principle on which I seek to proceed in the old case of *Dutton v. Dutton*, 4 Vin. Abr. 178, pl. 18. A father had separated from his wife, and was liable for her maintenance. His son took over all the father's property, and agreed to indemnify the father against maintaining the wife. Cowper, C., said it was the same as if the son had undertaken to maintain her, and though the son doth offer to maintain her at his own house, yet he did not think she is bound to accept that offer; for though he stands in the place of her husband as to maintenance, and a husband is not bound to allow anything to his wife for maintenance if he offers to take her home, yet in this case here lies no such obligation upon the wife to live with the son, and though she refuses, she ought to have a reasonable allowance. This case is noted in the same words as in Viner in two places in 2 *Equity Cases*, Abr. p. 150, pl. 7, and p. 739, pl. 4.

Decisions in the States appear to be in the same direction, and many eminent Judges have there held that when a provision is made for maintenance by deed or will, and no express direction is given where or how it should be furnished, the person entitled to receive it has the right to require it to be furnished at any place which he may select, if it can be supplied there without needless or unreasonable expense: *Hubbard v. Hubbard*, 12 Allen (Mass.) 589; *Wilder v. Whittemore*, 15 Mass. 262; *Rowell v. Jewett*, 69 Me. 300. See also *Bogie v. Bogie*, 41 Wisc. 219.

PROUDFOOT, J.—Hyacinthe Sabourin by deed, dated the 4th November, 1863, granted to his son Thomas Sabourin 100 acres of land, and certain horses, cattle, sheep, and

hogs with all the farming utensils and household furniture on the place in fee, in consideration of \$300, therein recited to have been paid. The conveyance, however, was subject "to be defeated and rendered null and void upon the non-performance by the said party of the second part (Thomas Sabourin) of the following conditions or any part thereof, viz., the said party of the second part, his heirs and assigns, covenants to feed, clothe, support, and maintain the said party of the first part, (Hyacinthe S.) in a decent and becoming manner suitable to his condition in life, for and during the term of his natural life. And further, the said party of the second part covenants to have the said party of the first part decently buried after his death according to the rights of the Roman Catholic Church."

Thomas Sabourin was at the time living with his father on the place, and continued in possession and maintained his father on the land till his (T. S.) death on 4th October, 1865. Thomas at the time of his death had been married for about a year, and left a widow and one infant child. The widow was unable to work the place, and went to her father's very soon after the funeral, and took away nearly all the chattel property. The widow told Hyacinthe that she could not support him because she was alone; and asked him if he would consent that another son-in-law Tranchemontagne should step in and support him. Hyacinthe said he was very glad of that. The widow, Hyacinthe, and Tranchemontagne, met a few days after, and an arrangement was made between them. The widow was to give Tranchemontagne a cow, butter, a canoe, and different articles in order that he might keep Hyacinthe; and he was to have the farm. This arrangement fell through,

The widow then made an arrangement with her cousin Pillon to support Hyacinthe, and he was to take as good care of him as if he was his own father. He was to do for him as Thomas Sabourin was under the deed. Pillon was not to get a deed of the land, he was to have the use of the land, a scow, a canoe, a tub of butter, articles to give

him a chance to support Hyacinthe, a pig, a horse, a plow, a harrow, three sheep, and such cordwood as he could make on the land, and if Hyacinthe was not satisfied, he was to complain to the widow: Under this arrangement Pillon went into possession of the land, and maintained Hyacinthe for about two months, when he left as he was very ill. Hyacinthe wrote to the widow that Pillon was leaving, and desired her to meet him at the office of the Crown Attorney, Mr. Dartnell, at L'Original.

They met there, and the widow asked Hyacinthe what sort of an arrangement he wanted. He said Pillon was going away, and he, Hyacinthe, wanted £22 a year as long as he lived, and the cow and three sheep. The widow reflected on this, and told him she was in the same position she had been in, and said, "my little daughter is still your daughter; you will feel attached to that young child; you had better come back with me to my father's house," where she was then living. She had arranged with her father, who had promised to treat him as he would treat her. This she told to Hyacinthe, who refused to go, saying, "unless I am dragged with a cord, I will never go." She then proposed that he should live with her brother John, who had promised to take him. This was also refused—that he would no more go to John's, than to John's father's. The articles that had been given to Pillon were got by the widow: A bedstead and a stove were left on the place.

On the 22nd March, 1866, Hyacinthe recovered judgment in an action of ejectment, on default of appearance, brought by him against the widow and child.

On the 20th August, 1867, Hyacinthe made a deed of the land to a son-in-law, Hilaire Sawaire, subject to the same condition as to maintenance, &c., as in the deed to Thomas, and the land was subjected to a charge of \$50 per annum in case of breach of the condition.

Sawaire kept Hyacinthe for about a year, but found he could not comply with the stipulation for maintenance, and afterwards on the 5th July, 1875, reconveyed the land to Hyacinthe.

On the 15th July. 1875, Hyacinthe granted the land to his son Amédé Sabourin, in consideration of one dollar, and on the 14th December, 1875, Amédé granted the land to his brother Pierre Sabourin, the defendant.

It appears that after Pillon left, Hyacinthe was supported for a year by his son-in-law Jean Joliefeu; and after that for a time at John Sabourin's, a son, then by his son Amédé for five months.

Sawaire's right name is Lavoie; he could not agree with Hyacinthe. Pierre supported Hyacinthe on the farm for some years, and then took him to live with him in Hull, where he died on the first of May, 1880.

The plaintiff, the daughter of Thomas, is still an infant.

Mr. Justice Armour has held that the effect of the covenant is, that Hyacinthe was to be fed, clothed, supported, and maintained, wherever he might choose to live; but that he was not bound to go to any place the covenantor or his representatives might require him to go and live in order to be there supported; and that he was justified in refusing to accept the offer made to him by the widow.

The learned Judge attached no importance to the recovery in ejectment, and I agree with his view of it.

Upon the other question, viz., where the maintenance was to be furnished, and whether it was optional with Hyacinthe to select the place of his residence, I have not been referred to any English case; and, after diligent search, have found none that determines this question. The Chancellor has kindly referred me to *Dutton v. Dutton*, 2 Eq. Ca. Abr. 150, which I will notice further on.

We must assume that the deed to Thomas was valid; it has not been impeached, and no suggestion even has been made that it was improperly obtained, or that it was open to any of the objections to which such deeds have sometimes been held liable.

The effect of that deed was to make Thomas the absolute owner of the land and chattels, for which Hyacinthe received \$300, and a condition for maintenance for life. The life interest of Hyacinthe was not reserved out of the

land, it rested solely on the condition, with probably an equitable charge on the land.

Then where was Thomas bound to fulfil the condition—to afford the maintenance?

A number of American cases are cited by Mr. Justice Armour, without stating their effect. I have read them all.

Pool v. Pool, 1 Hill, N. Y. 580. A father conveyed a house and some other property, worth in all about \$600, to two of his sons, who covenanted to pay his debts \$150, and to keep and maintain him in boarding, &c., during his life, and to keep and maintain their two younger brothers, till they attained twenty-one years of age, in a manner suitable for the father to provide for them in case he should live, and had not conveyed away his property. One of these younger brothers left the home when he was seventeen years of age, and never returned. He sued for his maintenance. It was held he could not recover, that the grantees were only bound to keep and maintain as the father would have done, and therefore at the home. The learned Judge construed that to be the meaning of the covenant, and it would seem supported by its terms. So that it affords no assistance in the present case.

Goudy v. Goudy, Wright, Ohio, S. C. R. 410, is only valuable as showing that where land is conveyed by a father to his son in consideration of certain covenants by the son to provide for the wants of his parents for a stipulated time, and the son died before his parents leaving a widow and an infant child, (as in the present case) that the widow to save her dower and the child's interest, might continue the maintenance and charge it on the land.

Wilson v. Wilson, 38 Me. 18. A father conveyed land to one of his sons on this condition: "That the son William Wilson is to maintain and support in a comfortable and convenient manner the said Ephraim Wilson, together with his wife, and a son and daughter, during their natural lives." William Wilson alienated the land to the defendant, and consigned the son and daughter to him to maintain. The defendant had also kept Ephraim at different

places. The learned Judge who decided the case, says : "The condition in the deed from Ephraim to William was designed to secure the support of Ephraim, his wife, and two children. There does not appear to have been any personal obligation on the part of William to provide for the support of the parties mentioned in the deed from Ephraim. They were to be supported in a comfortable and convenient manner, or the estate was to be forfeited. But there was no place specified at which the support was to be furnished, nor is there any specific provision how they should be supported, further than that it should be done in a comfortable and convenient manner. * *

With respect to the persons who may perform a condition, it is a general rule that every one who has an interest in the condition, or in the lands to which it relates, may perform it." Citing *Cruise's Digest*, Greenl. ed., vol. 2, c. 2, par. 6.

Thomas v. Record, 47 Me. 500, determines nothing more than that a father may enter for condition broken to furnish maintenance, and that his right is superior to that of a creditor of the son.

Simonds v. Simonds, 3 Metcalf (Mass.) 558, determines that a condition to maintain can be performed by an alienee of the land, and therefore that a devisee can make a good title by conveying subject to the charge.

Gray v. Blanchard, 8 Pick. 283 (Mass.) turned upon the point whether a clause in a deed was a condition or a covenant. To the same effect is *Hamilton v. Elliott*, 5 Serg. & Rawle 375, (Penn.)

Willard v. Alcott, 2 N. H. 120, decides only that a right of entry for condition broken may be waived. To the same effect is *Andrews v. Senter*, 32 Me. 394.

Copeland v. Copeland, 89 Ind. 29. A husband, and his wife to bar her dower, conveyed certain lands to a son of the husband, which he incumbered with one half the expenses of the full and entire maintenance of himself and his wife during each of their lives. The wife afterwards deserted her husband, and lived at a different place from

the son and the land. She sued for half her maintenance. The son alleged that he had always been ready and willing to support her at the home of her former husband. The learned Judge says at p. 36: "There was no condition in the deed that such support should be furnished her only while she lived at the home of John Copeland as his wife. This condition might have been put in the deed, but it was not. Courts can only enforce contracts as they find them, and not as parties long after their execution, may think they ought to have been made." There was no covenant to maintain, and the remedy was confined to enforcing the lien on the land.

An English case *De Crespigny v. De Crespigny*, 9 Ex. 192, was also referred to. In a covenant in a separation deed, the father covenanted that he would pay the whole expense of the education, maintenance, and support of the three children of himself and his wife, all of whom were to remain in his custody and control; with a proviso that if any of the children lived with their mother with his consent, she was to pay for their education, maintenance, and support while they resided with her. Two of the children attained twenty-one years of age, and were not for the year, for which maintenance was claimed, residing with their mother, nor under the care or custody of the defendant. It was held that the father was liable for the maintenance though the children were not under his control, and that if he intended to limit it in that way, the covenant should have provided for it. This was a state of things not covered by the covenant, and the father was liable on his common law liability to support his children.

I now notice *Dutton v. Dutton*, 2 Eq. Ca. Abr. 150, 4 Vin. Abr. 178 pl. 18. It is very shortly reported, and facts enough are not given to enable us to say that it enunciates a general rule, or is only one applicable to the particular case. The husband and wife had separated by consent, and apparently from the misconduct of the husband. The husband had conveyed his estate to his son, who agreed to indemnify him for the maintenance of his mother. The

son offered to maintain her at his house, which the Chancellor held she was not bound to accept. It will be observed that the wife was suing her husband and his son for a money maintenance. The husband was liable to pay this, and the son was joined because he had agreed to indemnify his father. There was no agreement between the son and the wife, that he was to maintain her. The case is referred to in *Bell* on the Law of Property of Husband and Wife, p. 541, as establishing that when a third party has covenanted for a valuable consideration received from the husband to pay maintenance for the wife, then living apart from her husband, it will not be in the power of such a party to avoid his covenant by offering to take the wife into his own house, and for very obvious reasons; the wife is under no obligation, legal or moral, to live with such a stranger, and her doing so would in no degree necessarily promote a reconciliation between her and her husband, which is one at least, of the objects the law has in view in allowing the husband to put an end to his covenant to pay a separate maintenance, where the separation is only temporary.

If this be the true explanation, then the case is only applicable to a special class of circumstances. In other words, it may be said the husband was liable to pay a money demand for the separate maintenance of the wife; the son took his place, and was bound to pay in money; and although the husband might discharge his liability by taking his wife home, no other person could relieve himself of his covenant by an offer to take her to his home.

But in the present case the condition is a condition subsequent, and a different construction may well be put upon a liability upon a covenant, and that upon such a condition. In the *Touchstone*, p. 133, it is said: "It is a general rule, that such conditions annexed to estates as go in defeasance, and tend to the destruction of the estate, being odious to the law, are taken strictly, and shall not be extended beyond their words, unless it be in some special cases. And therefore if a lease be made, on condition

that if such a thing be not done, the lessor (without any words of heirs, executors, &c.,) shall re-enter and avoid it; in this case regularly the heir, executor, &c., shall not take advantage of this condition." The special cases referred to as forming an exception to the rule, appear to be those of mortgages; as if a mortgage be made upon condition that if the mortgagor and another pay £20 on such a day to the mortgagee, that then he shall re-enter, and the mortgagor die before the day. In this case the other person may pay the money and perform the condition. But otherwise it is while the mortgagor doth live for in that time the other alone without him may not tender it, and if he do, this tender is no performance of the condition.

In such conditions the construction is strict to prevent forfeiture, liberal as to performance. Thus in *Popham v. Bampffield*, 1 Vern. 79, 1 Eq. Ca. Abr. 108, pl. 2, a testator devised real estate to trustees for payment of debts, and, after his debts paid, then in trust for A. and his heirs male; but declared that A. should have no benefit of the devise, unless his father should settle upon him a certain estate and in default then over. It was held that this condition was performed by the father *devising* his estate to his son. That is, a substantial performance is sufficient.

And if one make a feoffment in fee, on condition that the feoffee shall make an estate back again in tail to the feoffor and his wife before such a day, and before that day the feoffor die; in this case the condition shall be performed as near to the intent as may be; and therefore if the condition be, that he shall make the estate to them two, *habendum* to them and the heirs of their two bodies engendered, the remainder to the right heirs of the feoffor, the estate shall be made to the wife for life without impeachment of waste, the remainder to the heirs of the body of the husband begotten on the wife. *Touchstone*, 134. Again, that substantial performance is enough.

In the case before us, the condition is to maintain without specification of place. I think it imposes no personal

obligation on the grantee, it may be fulfilled by any one having an interest in the property ; and may be performed wherever the grantee or his representative might reasonably offer. All that Hyacinthe contracted for was maintenance, and he seems to have been indifferent where it was provided, or he would have specified a place.

I do not think the circumstances of the family have any effect in enabling us to imply a term in the condition that is not expressed. When the deed was made Hyacinthe, Thomas and his three brothers were living together on the place, and continued to do so after Thomas's marriage and down to his death. But the condition contains no reference to the brothers, and it was never intended that they should be maintained or continue to reside there.

The defendant was examined, and says he heard the bargain, and that Thomas was obliged to support the old man for his life time, and that he should continue to live on the farm. But I apprehend that the statute (R. S. O., ch. 62, s. 10) requiring that as against the estate of a deceased person no one should obtain a judgment, verdict or decision on his own evidence in respect of any matter occurring before the death of such person, unless his evidence is corroborated by some other material evidence, applies to this case, and it is just such a one as shows the value of the statute. The defendant is seeking to maintain his title to the land by evidence of an agreement with the deceased Thomas, twenty years before, that had been violated. The statute is not confined to evidence of an agreement with the witness ; it is in respect of any matter. And how easily might that clause, "be maintained on the farm," slip in. The only thing in the shape of corroboration is a statement by John Rouleau, a brother of the widow, who says, "I did not personally know the nature of their arrangements ; but I was told then that young Sabourin was obliged to support his father, and they had to live all together." It does not appear who told him this, nor at what time he heard it. He says he went to Sabourin's place previous to Sabourin's marriage with his

sister, and they were then all living together, and also afterwards. It may have been before or after the marriage. But even if it had been more specific, I would have hesitated to place any reliance upon it. For the witness was examined through an interpreter, and some of the answers cannot have been those given by the witness. Thus he is asked if he made any arrangement with his sister about taking the old man, and he says he did. He was then asked, "Did you take the old man?" His answer is, "I did." Now, it was never pretended by any one that John Rouleau took him. And, indeed, a few lines further on, he shows he did not take him, because the old man, he was told, would not go to any place. Besides, the corroborative evidence is to be evidence, and hearsay is not evidence, and I take it to be inadmissible to explain or to supply defects in the deed, or to give it any other operation than flows from the language used.

To determine whether the maintenance furnished, or offered to be furnished, was sufficient in amount, or was offered to be provided in such a manner, and at such a place as to be a substantial performance of the condition, must be left to the discretion of the Court, based upon the circumstances of the parties and the amount of the property.

Upon the death of her husband, the widow was left with an infant of two or three months old. Her husband had just died of fever; his two young brothers were lying ill of it. It was an unhealthy place, for Pillon was also taken ill, and obliged to leave it. The widow endeavoured to get the place worked, and the old man maintained on it. Finding this impracticable, she proposed, with the sanction of her father and brother to have him maintained at either of their places, and both offers were refused. No reason was assigned for the refusal, and I do not think we are at liberty to conjecture reasons for his refusal. He seems to have been an ill-tempered and rather rough-speaking man. Joseph Tessier was present when the widow made the offers to him, and says: "The old man

answered her roughly and unkindly. She said to him, 'You should not speak to me in that way. I do not deserve that treatment from you.' * * He spoke very badly to her. She began to cry, and said, 'Pa, do not refuse me that. Come home with me and I will keep you, and you will be with the baby who will be a cause of distraction to you.'” The defendant says that Lavoie kept the old man for about a year, but he did not agree with him. In my opinion the proposal was a reasonable one, and ought to have been accepted, and that it was a substantial fulfilment of the condition to maintain. The refusal was capricious, or the result of ill temper. That the title to the land has descended upon the infant plaintiff, who is entitled to recover, subject to her mother's dower.

The defendant does not claim to be a purchaser for value without notice, and it is plain he could not. Having notice, he would not in ordinary circumstances, be entitled to claim for improvements under the Statute R. S. O. ch. 95, sec. 4; *The Corporation of Wyoming, &c. v. Bell*, 24 Gr. 564, if he were to be judged by ordinary rules. But all the parties seem very illiterate, and the defendant appears honestly to have believed the property to be his own. The defendant should be allowed for such improvements as mentioned by the statute.

FERGUSON, J.—The facts have already been stated at sufficient length. The question in the case turns, I think, and, as was said by the learned Judge before whom the cause was tried, upon the construction to be given to the conveyance of the 4th of November, 1863, between Hyacinthe Sabourin and his son Thomas Sabourin. This, as appears by the memorial of it, a copy of which is in evidence, was a conveyance from Hyacinthe to Thomas in fee, containing a condition in these words: "Subject, however, to be defeated and rendered null and void upon the nonperformance by the said party of the second part of the following conditions or any part thereof, viz: the said party of the second part, his heirs and assigns covenants to feed, clothe, support and maintain the said party of the

first part in a decent and becoming manner suitable to his condition in life, for and during the term of his natural life, and further, said party of the second part covenants to have the said party of the first part decently buried after his death, according to the rites of the Catholic Church."

I think the learned Judge was quite right in construing this conveyance as being made upon condition, and as being liable to be defeated and rendered void by the non-performance of the covenant. To me, it appears to be plain that the conveyance was made upon a *condition subsequent*. It was a condition annexed to the estate granted, the proper effect of which was, that if broken, the title would go to the grantor, or those claiming from him the reversion in the lands.

The argument before us was chiefly as to whether or not the condition *had been* broken. The evidence on the subject has been so fully referred to by the Chancellor and Mr. Justice Proudfoot that I forbear repeating it here. The answer to the question whether or not there was a breach of the condition depends mainly upon whether or not the grantor was justified in declining the offer that was made to have him supported and maintained, not upon the land in question or at a place of his choice, but at a place chosen by the widow of the grantee. If the contract be looked at in connection with the facts as they existed at the time that it was made, as was done in *Pool v. Pool*, 1 Hill, (N.Y.) 580, which was, amongst other cases, referred to by the learned Judge who tried the cause, one is inclined to the opinion that the intention was that the grantor should receive the support and maintenance on the farm in question. The defendant, in answer to a question asked by the learned Judge at the trial, says it was the intention of the parties to the contract that the old man, the grantor, should continue to live upon the farm. John Rouleau, a brother of the widow of Thomas Sabourin, when asked if he recollected the circumstances of the death of Thomas, says: "Yes. He died on the Grand River, on the same property. Hyacinthe Sabourin was

living with his son at the time. I went there previous to Sabourin's marriage with my sister, and they were then all living together, and also afterwards. I did not personally know the nature of their arrangements, but I was told then that young Sabourin was obliged to support his father, and that they had to live all together."

This is a suit by the heiress of the deceased, Thomas Sabourin, and the defendant is an opposite and interested party. The evidence (on the subject of the intention of the parties to the deed) given by the defendant, is not, I think, contradicted. It is corroborated, so far as the verbal evidence goes, only by the evidence of Rouleau, that I have before referred to. He speaks only of what he was told by others; but what he says he heard, was told to him on the farm in question, and upon his visits to the family before or after the marriage of his sister to Thomas. He [does not say whether before or after, nor does he say who told him. The matters referred to are occurrences before the death' of Thomas Sabourin, and if a decision were to rest upon the defendant's evidence on this immediate subject, and only the verbal evidence of Rouleau to corroborate it, I should not think that there is sufficient corroboration under the provisions of the statute, but the undisputed facts and circumstances must also be taken into consideration. Looking at the circumstances surrounding the parties at the time the deed was executed, and what the parties did after its execution, so far as these are disclosed by the evidence, I think there is a good foundation for the opinion that, in fact, there was an intention that the grantor in the deed was to be supported on the land in question. I may here say that I am of this opinion.

In construing the deed, one can, of course, look only at the document itself in the light of the surrounding circumstances at the time of its execution. No clause can be added to the deed now, on the ground of the existence of such an intention as that to which I have been alluding, and I have referred to it for the purpose

only of whatever bearing it may have upon the question, as to whether or not the conduct of the grantor in declining to accept the offer that was made to him was of an obstinate and unreasonable character. Whether the offer made to the grantor was a sufficient one, even for his maintenance, not upon the lands in question, or at a place of his choice, but at a place to which he had an objection, it being made by the widow of the grantee, and to the effect that her father would support the grantor at his place, there being no communication on the subject directly between her father and the grantor; or whether the offer was an offer of what was sufficient, even if no regard be paid to the place at which the proposed support would be given, it not being proposed by the offer that the widow's father should in any way become bound to maintain the grantor, may, I think, be, at least, doubted; but, assuming that the offer was a sufficient one of the support and maintenance at the place indicated by it, then was the grantor bound to accept it, or could he not say that he would require the maintenance upon the farm in question, or failing that, at a place to be selected by him, or at a place that might be mutually agreed upon? The language used by the grantor in declining to accept the offer made by his daughter-in-law seems to be harsh, and some of it, so far as one can perceive from the evidence, uncalled for, but nevertheless, I am of the opinion that the act of declining the offer was not an act that can be considered obstinate or unreasonable, and I think it was not an offer that he was bound to accept. Authorities on the immediate subject are not so abundant as one would expect to find them.

The case of *Dutton v. Dutton*, 4 Vin. Abr. 178, pl. 18, which is referred to in *Chitty's Eq. Dig.* 2, p. 1044, seems, on this point to support the decision of the learned Judge. All the points of the judgment in that case do not, however, appear in the Digest. In that case, Dutton, having more than £3,000 per annum, married M., the plaintiff, who had £10,000 portion, and settled £1,000 per annum

upon her for her jointure, and the greater part of his (Dutton's) estate was settled, as was usual in marriage settlements. Dutton ran greatly in debt, and F., his eldest son, being of full age, Dutton agreed to convey all his estate to him. F. covenanting to pay all Dutton's debts and allow him £500 per annum rent charge for his life, and further, to indemnify him (Dutton) from all debts, charges and expenses for the maintenance of M., being then separated by consent. M. brings a bill against her husband and F., his son, to have an allowance for her maintenance. The Chancellor said, "that by this covenant to indemnify the father from maintaining his wife, the son had taken upon himself the charge of maintaining her, and as to this purpose, stands in the place of her husband, who is bound to give his wife an allowance if he voluntarily separate from her, and he took the son to be in the nature of a trustee for the wife so far as a reasonable allowance for her maintenance, and though the son doth offer to maintain her at his own house, yet he did not think she is bound to accept the offer, for though he stands in the place of her husband as to her maintenance, and a husband is not bound to allow anything to his wife for her maintenance if he offers to take her home. Yet, in this case here, lies no such obligation upon the wife to live with the son, and though she refuses, she is to have a reasonable allowance." And he ordered her to be allowed £200 a year.

In the case of *Hubbard v. Hubbard*, 12 Allen (Mass.) at page 589, the Court in delivering judgment and referring to a number of cases on the subject, said: "It has been held in several cases, where a provision for the maintenance and support of persons has been made by a deed or will, and no express direction given where or how it should be furnished, that the person entitled to receive it had a right to require it to be furnished at any place which he might select, if it could be supplied there without needless or unreasonable expense." To the same effect seem to be the cases *Wilder v. Whittemore*, 15 Mass. 261, and *Rowell v.*

Jewett, 69 Me. 293. The case of *Bogie v. Bogie*, 41 Wisc. 209, seems to support the same view.

On the whole case, I am of the opinion that the grantor was not bound to accept the offer that was made, and that there was a breach of the condition, the effect of which was to revest the estate: to use the words of some of the books, the title went to the grantor or those claiming from him the reversion in the lands, and if an election by the grantor were necessary to fully revest the estate, this was certainly made by acts sufficiently unequivocal.

The judgment should, I think, be affirmed, with costs.

Judgment affirmed.

G. A. B.

[COMMON PLEAS DIVISION.]

POLSON ET AL. V. DEGEER ET AL.

Sale of goods—Hire receipt—Property passing—Engine and boiler—Illegal detention.

An engine, boiler, and other machinery, were shipped by plaintiffs to the defendant E. under a written order to ship same to his address as per sum agreed on, viz., \$875; \$225 to be allowed for E.'s portable engine and boiler, and \$635 to be paid on shipment; but, if not settled for in cash or notes within twenty days, then the whole amount to become due. The order not to be countermanded, and until payment the machinery to be at E.'s risk, which he was to insure, and on demand was to assign the policy to the plaintiffs, and the title thereof was not to pass out of plaintiffs, E. agreeing not to sell or remove same without the plaintiffs' consent in writing. On default in payment the plaintiffs could enter and take and remove the machinery, and E. agreed to deliver same to plaintiffs in like good order and condition as received, save ordinary wear and tear, and to pay expenses of removal. Any notes or other security given by E. for his indebtedness to be collateral thereto. The machinery was put up in a mill on premises leased, with right of purchase, by defendant D. to E.'s wife for one or five years from 11th March, 1883. E.'s wife died on the 23rd October, 1883, and by her will appointed E. sole executor, giving him power to sell or dispose of any property to which testatrix was or might be entitled. E. by deed of 27th April, 1885, demised and released to D. all the right, title, and interest in the premises as well of himself as also as executor, together with the mill built thereon, with the boiler and engine, &c., and on the same day D. leased the said premises, mill and machinery, to E. for one year. After the execution of this lease D. mortgaged the land, mill and machinery to the defendants the F. Loan Society. The defendant E. never paid any cash, but gave his promissory note at 3 months, which was renewed from time to time, but ultimately E. having failed to pay same, the plaintiffs demanded the machinery when D. notified plaintiffs not to remove same, as also did the Society.

Held, that the effect of the transaction was, that the property was in the plaintiffs, and that they were entitled thereto; and that there was an illegal detention by the defendants D. and E. amounting to a conversion; and that the F. Co. by having notified plaintiff not to remove the machinery, were proper parties to the suit to give plaintiffs full relief; and that unless defendants allowed plaintiffs to remove the machinery on demand, the plaintiffs were entitled to recover \$650 with interest, being the price of machinery, and that upon removal of the engine and boiler the sum of \$60 for repairs should be paid by plaintiffs to D. to be repaid to plaintiffs by E.

THIS action was tried before Galt, J., without a jury, at Toronto, at the Spring Assizes of 1886.

The action was brought by the plaintiff to recover the value of a certain engine and boiler, and certain other machinery in connection therewith, sold by the plaintiffs to

the defendant Ellis under an agreement in writing, the material parts of which were as follows :

“TORONTO, February 26, 1884.

“To Wm. Polson & Co., Toronto :

“Please ship to my address as soon as possible from Toronto the following machines as per prices agreed upon.”

Then followed an enumeration of the different articles of machinery, with the prices, aggregating \$875.

“Terms, \$225 to be allowed for my portable engine and boiler, f. o. b. at Sunderland, and \$635 to be paid at time of shipment. And I hereby agree that if this machinery is not settled for by cash and notes according to the above terms of sale within twenty days after date of shipment then the whole amount shall become due ; and I further agree not to countermand this order, and until payment in full of the purchase money this machinery shall be at my risk, and I will insure in your favour for an amount sufficient at all times to cover your interest therein, and on demand will assign and deliver to you the policy of insurance, and the title thereof shall not pass from you ; and I will not sell or remove any of this machinery from my premises without your consent in writing so to do ; and in case of default of any of the payments or provisions of this order you are at liberty without process of law to enter upon my premises and take down and remove the said machinery ; and I hereby agree to deliver the said machinery to you in like good order and condition as received (subject to ordinary wear and tear) ; and I hereby waive all claims for damages, and will pay the expenses of such removal. And I hereby declare that the foregoing embodies all the agreements made between us in any form, and that any note or notes or other security given by me to you for this indebtedness shall be collateral thereto.”

The machinery was shipped by the plaintiffs to the defendant Ellis's address at Vroomanton, where it was received by him and put up in a mill on certain premises leased by the defendant Degeer to one Mary Ann Ellis, wife of the defendant Ellis, for the term of one or five years computed from the 11th March, 1881, and which premises the defendant Degeer agreed by articles of agreement, under seal, and bearing date the 24th of October, 1882, to sell to the said Mary Ann Ellis for the sum of \$2,700.

Mary Ann Ellis died on the 23rd of October, 1883, having first made her last will and testament, constituting the defendant Ellis, her husband, sole executor, and giving

him power to sell and dispose of any property to which testatrix was or might be entitled.

On the 27th day of April, 1885, the defendant Ellis by deed poll, bearing that date, remised and released to the said defendant Degeer all his right, title and interest in the premises in the said agreement from Degeer to Mary Ann Ellis mentioned, together with the mill built thereon, with the boiler and engine and all fixed and movable machinery, and all other estate, right, title, and interest he had in himself or as executor of Mary Ann Ellis, to hold to the said Degeer, his heirs and assigns, to and for his and their own use forever. On the same date Degeer, by indenture of lease demised the said land, mill, boiler, and engine with fixed and movable machinery to the defendant Ellis for one year from the 27th of April, 1885.

After the execution of the release from Ellis to Degeer and the lease, Degeer mortgaged the land, mill and machinery to the defendants, the Freehold Loan and Savings Company. The defendant Ellis did not pay cash as he agreed to do, but gave his promissory note to the plaintiffs at three months, which was afterwards renewed from time to time, and ultimately, he having failed to pay, the plaintiffs through their solicitors, Messrs. Hands, Echlin & Garvin, made a demand in writing upon the defendants Degeer and Ellis of the engine and boiler, dated 2nd September, 1885; Degeer having previously, on the 1st August, 1885, through his solicitor, Mr. John A. McGillivray, forbidden the plaintiffs to remove the same, and threatened proceedings against them if they attempted to do so. To the demand of the 2nd September, 1885, Degeer's solicitor replied by telegram, stating:

"Have written you to day, and do forbid removal of machinery."

On the 19th September, 1885, Mr. John Leys, solicitor for the defendants, the Freehold Loan and Savings Company, wrote to the plaintiffs to the following effect:

"Re Degeer, part lots 6 and 7, con. 7, Brock.

"The Freehold Loan and Savings Company are instructed that you intend removing an engine and boiler from off the above premises, of

which the said company are mortgagees. I am instructed to take such proceedings as I may deem advisable to prevent such removal, and the said company will look to you for any acts or damages occasioned by the removal or attempt at removal of the said engine and boiler, or either of them.

Subsequently, on the 22nd September, 1885, the plaintiffs' solicitors wrote to Mr. Leys, as solicitor for the Freehold Loan and Savings Company, informing him they had been instructed by the plaintiffs to commence an action against Degeer and Ellis for the wrongful detention of the boiler and engine, and asking the release of the machinery from the operation of the company's mortgage to avoid the necessity of making the company a party to the suit. With this request the company did not comply, and were joined as defendants.

There was no dispute or contest as to the correctness of the facts, the question being resolved into one of law on these facts.

The learned Judge found in favour of the plaintiffs, and endorsed the following judgment on the pleadings:

"I give judgment in favour of the plaintiffs as respects the right of property; and, if they remove the property, then no damages. If the defendants refuse to allow the plaintiffs to remove the machinery I assess the damages at \$650. If the defendant Degeer allows the machinery to be removed the plaintiffs are to pay him \$60 for repairs."

Against this finding and judgment the defendants Degeer, and the company, moved pursuant to notice of motion to set aside the same and enter judgment for the defendants, with costs, on the grounds: (1) The said judgment is contrary to law and evidence: (2) The machinery became the property of the defendant Ellis notwithstanding anything contained in the written agreement of sale: (3) As between the plaintiffs and the defendants Degeer and the Freehold Loan and Savings Company the said machinery became part of the land, and as such the title thereto became vested in said defendants as against the plaintiffs: (4) The plaintiffs are not entitled to recover

herein against the defendants because the defendants did not take, keep, or detain, or convert the machinery: (5) No sufficient demand or refusal were proved to entitle the plaintiffs to recover: (6) The plaintiffs were not entitled as against the said defendants to take or remove said machinery without restoring and placing in the mill the old machinery received by them in part payment: (7) The plaintiffs are not entitled to judgment against said defendants for any sum of money, but at most only to a declaration as to their right to remove said machinery: (8) In any event the full value of the said old machinery together with the expense of replacing same in the mill should be deducted from the plaintiffs' claim.

The plaintiffs by way of cross motion moved against the finding of the learned Judge as to the sum of \$60 allowed to the defendant Degeer, to make good any injury that might be caused by the removal of the machinery; and to increase the damages to the sum of \$875 in case the removal of the machinery should not be permitted by the defendants.

During the same sittings, June 4, 1886, *Reeve*, Q.C., and *McGillivray*, supported the defendants' notice and shewed cause to the plaintiffs. They referred to *Joseph Hall Manufacturing Co. v. Hazlitt*, 11 A. R. 749; *England v. Cowley*, L. R. 8 Ex. 126; *Pardee v. Glass*, 11 O. R. 275; *Washburne on Real Property*, 4th ed., 25-6; *Ewell on Fixtures*, 81, 272-5; *Clary v. Owen*, 15 Gray 522; *Richardson v. Copeland*, 6 Gray 536; *Knowlton v. Johnson*, 37 Mich. 47; *Davenport v. Shants*, 43 Ves. 546; *Fryatt v. Campbell*, 5 Hill N. Y. 116; *Smalley v. Gallagher*, 26 C. P. 531; *Gasco v. Marshall*, 7 U. C. R. 193; *Crockford v. Alexander*, 15 Ves. 138; *Daniels v. Davison*, 16 Ves. 252; *Sugden on Vendors*, 4th ed., 33, 126, 681-2; *Cleaver v. Culloden*, 14 U. C. R. 491; *Oates v. Cameron*, 7 U. C. R. 228; *Hilbery v. Hatton*, 2 H. & C. 822.

Echlin and J. Baldwin Hands, contra, referred to *Stimson v. Block*, 11 O. R. 96; *Godard v. Gould*, 14 Barb. 662; *Benjamin on Sales*, 4th (Am.) ed. 329; *Amos & Ferrard on Fixtures*, 2nd ed., 20, 29, 72, 214.

June 26, 1886. CAMERON, C. J.—The first question to be decided is, what is the legal effect of the written order given by the defendant Ellis to the plaintiffs? Did the property and right of property remain in the plaintiffs thereby, or does it only amount to a license on Ellis's part to the plaintiffs to resume possession of the engine and boiler on default in payment? If the former is the effect, then the judgment of my learned brother Galt given at the trial was right. If the latter, the plaintiffs must fail.

If the writing cannot be distinguished from the contract under consideration in the *Joseph Hall Manufacturing Co. v. Hazlitt*, 8 O. R. 465, affirmed in appeal, 11 A. R. 749, that is an authority conclusive against the defendants.

The question has more recently come under review again, incidentally in the Court of Appeal, where the principle of the decision in the case of the *Joseph Hall Manufacturing Company v. Hazlitt*, was recognized and approved, namely, the affixing of the property of a stranger to the freehold of another did not operate to deprive the stranger of his right to the property when it could be removed without serious damage to the freehold. The case is *Stevens Manufacturing Co. v. Barfoot*, 9 O. R. 692, not yet reported in Appeal.

While from the confused arrangement of the stipulations in the order, note or contract, there is room for the argument that the word "title" which is what shews the property was to continue to be the plaintiffs till paid for, applies to the policy of insurance and not to the machinery; I think by the whole tenor of the document, and it is by all its parts that it must be interpreted, the word is referable to the machinery, the property in which was not to pass to Ellis, but was to remain the plaintiffs till paid for. There is no doubt when this machinery was placed in the mill, it was the intention of Ellis it should be a permanent improvement of the realty, the mill property; and therefore it would, if he had been the owner of the machinery, have passed under his release to Degeer. But as it was not his he could not by his act deprive the owner of it.

There remains to be considered the question, whether the action in its present shape is maintainable against the defendants Degeer and the Freehold Loan and Savings Company ?

Treating the machinery as a chattel—and it must be so regarded as far as the plaintiffs and defendants are concerned, in deciding upon their rights in this action, if I am right in the construction I have placed upon the contract between Ellis and the plaintiffs—the buyer and seller of property to which the latter was not entitled at the time of sale are both responsible to the true owner as for its wrongful detention, though probably the buyer would not be liable to an action for conversion without a demand from him of the property, but by a refusal on his part in a case like the present he might be regarded as guilty of a conversion either at the time he purchased or at the time of the demand and refusal. The refusal would be at the option of the owner, evidence of the intent to assume dominion over the property as against the owner, or of a conversion at the instant of refusal to deliver the property up on demand.

In this case the release to Degeer mentions the engine and boiler as things expressly dealt with, and so he must be held to have been buying these articles as well as getting back his original estate in the land, and was thereby guilty of a conversion of them as against the plaintiffs, and so cannot escape liability for refusing to deliver them up on demand, though they were not in his immediate dominion and control, owing to Ellis being then in possession under the lease from Degeer to him. Degeer cannot invoke the lease in his favour, for by the act of leasing he committed an act of conversion, as by the release from Ellis to him he was given possession and control over the mill and machinery, which possession and control by the lease he transferred to Ellis, and thus converted the property. The action is not framed for a conversion, and the mere common law right to damages is not the issue presented on the pleadings.

The statement of claim is a narration of the facts, and the relief prayed is that the defendants may be ordered to return the said machinery to the plaintiffs, or \$875 as the value thereof, and \$225 as damages, not for the conversion but for the detention of the machinery ; and lastly, such other relief as may seem meet.

I am of opinion there has been an illegal detention amounting to a conversion by Degeer and Ellis ; and the defendants, the Freehold Loan and Savings Company, by having notified the plaintiffs not to remove the machinery became proper parties to the suit in order to give the plaintiffs full relief.

I think, therefore, the judgment of my learned brother Galt was correct, but should be modified in form, and should be, that the said engine and boiler with other articles pertaining thereto mentioned in the second paragraph of the plaintiffs statement of claim, were the property of the plaintiffs : that the defendants detain the same ; and that they do permit the plaintiffs by themselves, their servants or agents to remove the same on demand at the mill in which they are placed ; and failing so to do, that the plaintiffs do recover against the defendants for the wrongful detention the sum of \$650, with interest thereon from the 15th day of September, 1885, that being the date fixed by the plaintiffs for the removal of the machinery, when the defendant Degeer refused to permit its removal ; and that upon the removal of the said engine and boiler the plaintiffs pay to defendant Degeer the sum of \$60, to be expended in repairing any injury caused to the mill by such removal, and that the defendant Ellis do pay the said sum of \$60 to the plaintiffs.

With respect to the old engine and boiler which the defendant Degeer claims he should be allowed for, I am of opinion the removal of these from the mill must, under the evidence given by Degeer himself, be held to have been rightful, and Ellis had authority to dispose of them.

Then as to the plaintiffs' motion to reverse the judgment allowing to the defendant Degeer \$60 for repairing

any injury that may be done to the mill in the removal of the machinery, and to assess damages for the detention thereof at \$225, I am of opinion it does not sufficiently appear from the evidence that an allowance of \$60 for injury to the mill by the removal of the said machinery is at all excessive or unreasonable; and as to the claim for \$225 for damages, I am of opinion there is nothing in the case or evidence to warrant such claim. The value of the plaintiffs' interest as against the defendants in the machinery is only the balance of the price remaining unpaid. On payment of the balance the defendant Ellis would be entitled to the machinery, and the other defendants now have his rights in this respect.

The plaintiffs' motion will therefore be dismissed, with costs, and the plaintiffs are entitled to full costs of the action as against all the defendants, other than the costs of their motion now dismissed.

If the case turned upon the right of the plaintiffs to maintain this action to recover damages solely on the ground of an unlawful conversion, the contention of Mr. Reeve would be right, for the machinery was, at the respective times when the detention became wrongful, affixed to the freehold, and trover will not lie for fixtures while they remain attached to the freehold. See *Oates v. Cameron*, 7 U. C. R. 228. And probably under the authority of *England v. Cowley*, L. R. 8 Ex. 126, cited by Mr. Reeve, the defendants Degeer and the Loan and Savings Company would not be liable. But I do not express any positive opinion as to this latter being an authority governing under circumstances like the present.

I have not referred to the American authorities which were cited to the court as to the effect of contracts like the one in question here, as it is useless to consider authorities that, no matter how valuable they may be, cannot warrant any court of first instance in this country disregarding the express decision of our own courts.

The authorities cited by Mr. Reeve from *Vesey* do not shew as contended that Ellis had a right to sell the ma-

chinery so as to deprive the plaintiffs of their property, and leave them to what might be a barren remedy against Ellis.

We are not embarrassed as the law stands under the Judicature Act with the question as to whether the buyer and seller are guilty of a joint conversion by the act of sale and purchase.

In *Doe d. Edwards v. Kerr*, 13 C. P. 24, it was held that they were not. In *Hilbery v. Hatton*, 2 H. & C. 822 each was held to have been guilty of a conversion, but the question was not raised as to whether the conversion was joint or two distinct conversions, one by seller and the other by the purchaser.

GALT and ROSE, JJ., concurred.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

VANMERE V. FAREWELL.

*Medical practitioner—Malpractice—Evidence—Interference with jury—
Rejection of evidence in rebuttal.*

Action against a medical man for malpractice. The alleged malpractice consisted in applying what was called the primary bandage to a fracture of the forearm; and, if this was good surgery, then there was neglect and want of proper care, in applying the bandage too tightly, and in not placing the arm in proper position, whereby the arm became paralysed and permanently useless. The defendant admitted the use of the primary bandage, and justified its use as proper, and denied that there had been any neglect, &c. The jury found for the defendant.

Held, on the evidence the verdict could not be interfered with.

A medical man called by the defendant stated, from the evidence given by the defendant, and the evidence given throughout the case, he could not say the defendant's treatment was bad surgery. The plaintiff proposed to call evidence in reply to shew from what defendant stated at the trial the treatment was bad surgery.

Held, inadmissible.

The defendant in conversation with one of the jury panel, but not one of the jury called to try the case, said he hoped the jury would give the defendant the benefit of any doubt.

Held, not sufficient to justify the court in interfering with the verdict.

THIS was an action brought by the plaintiff, an infant, by her next friend, to recover damages for alleged unskilful and negligent treatment of the plaintiff, for a fracture of the forearm, whereby the arm became paralysed and permanently useless.

The cause was tried before Galt, J., and a jury, at Hamilton, at the Winter Assizes of 1886.

The alleged improper treatment was in applying what is called a primary bandage, which was said not to be good surgery; but, which if proper surgery, was applied too tightly and allowed to remain so too tightly applied, although the defendant was informed by the child's mother before he left the house after setting the arm, that the child complained of pain and the hand appeared swollen and discolored.

The arm sloughed at a part above the fracture, but below another fracture nearer the elbow, which the defendant was not aware of at all, and which was only discovered a short

time before the trial, when other medical men were examining the arm for the purpose of giving evidence at the trial.

There was conflicting evidence as to whether the plaintiff's arm had been too tightly bandaged or not; also as to the cause of the permanent injury to the arm. Some of the medical men attributing it to tight bandages, and others to injury on the soft part of the arm which led to the sloughing.

The jury found in favour of the defendant.

In Easter sittings, *Robertson*, Q.C., obtained an order *nisi* to set aside the verdict entered for the defendant, and for a new trial, on the ground that the verdict was contrary to law and evidence; for the rejection of evidence; and for misconduct of the defendant in communicating with jurors on the general panel, with a view of influencing them in favour of the defendant.

During the same sittings, June 3, 1886, *Robertson*, Q.C., supported the order.

Osler, Q.C., and *Teetzel*, contra.

In support of this last ground taken in the order, the plaintiff filed the affidavit of Thomas Small Hill, who swore that he attended the court as a juror, and that he knew William Lovett, a juror in this cause: that the trial began on Friday morning, the 8th January, and was continued until the evening of that day, and adjourned until the next morning, the jury being allowed to separate on the adjournment, that the trial was continued on Saturday up to three o'clock in the afternoon, and again adjourned till the following Monday. And that on the afternoon of Saturday, after the adjournment, the said juror William A. Lovett, entered the deponent's place of business, and remarked that the deponent had got off very easy, as up to that time he had only been called on one short case, whereas he Lovett had been two days on the case of *VanMere v. Farewell*. Deponent then asked if it was not settled yet, and Lovett replied, no it will last or take all day Monday. Deponent

then asked how he Lovett was going on the case, to which Lovett replied, "I am going in favour of Farewell." Deponent then said "we should not discuss the question."

The plaintiff also filed the affidavit of Charles Wilbert DeWitt, the material part of which was as follows: "I was in attendance at the last Hamilton Winter Assizes, as a juror. On Saturday the 2nd of January, 1886, I met one John Wilkins at the Victoria Hotel, in the City of Hamilton, and he remarked the Assize Court was to commence on the then following Wednesday, of which I was aware, and to which remark I assented. He then further remarked that there was to be a very important case between VanMere and Doctor Farewell; and he then asked me if I knew anything about it, or if I knew VanMere. I replied that I did know VanMere, although I had not seen him or his little girl since the accident had happened, and I knew nothing about the case, further than that I had heard she had a very bad arm. Wilkins then said, 'It is said to be a pretty big case. Do you know any of the jurors?' I replied that I was a juror myself. He said, 'I know the Doctor well, and he has always done well by me.' To which I replied, 'He may have done well by you and not well by VanMere;' and the conversation then closed. A few minutes after, the defendant Doctor Farewell, came in and went into an adjoining room and engaged in conversation with Wilkins; and, although I could not hear what they were saying, it was manifest to me by their manner and gesture that I was the subject of the conversation. I saw Wilkins pointing his thumb over his shoulder at me, and I saw the defendant looking at me and shaking his head and making other gestures that satisfied me at the time I was being referred to at the time. * * I was called as a juror, but was not sworn, the defendant having challenged me peremptorily after I entered the box."

One Morgan Shaver, a juror on the general panel, also made affidavit, that on the morning of the day on which the trial commenced the defendant came to him, deponent, and said: "In case I should be called on the jury, he wanted

me to give him the benefit of any doubt that should arise in my mind with regard to his neglect in the treatment of the plaintiff's arm. I made reply as follows: that the evidence given at the trial would guide me in the case if I should be called on the jury." This person was not called on the jury, and swore he never met the defendant, and had no acquaintance with him before.

The plaintiff's father, and next friend in the action, made an affidavit in which the only paragraphs important to be considered are the following, (2) "The defendant came to my house on the evening of Saturday, the 2nd of January last, before the Assizes commenced, for the purpose of serving the plaintiff with a subpoena and appointment to be examined before James Edwin O'Reilly Esq., special examiner, and after having done so, and as he was leaving the house, he turned to me, and addressing me said, referring to the action, "Bear in mind Ed., twelve men have to agree before you can get a verdict. * * (8) I am personally acquainted with William A. Lovett, and he was a juror at the said Assizes, and was called and sworn on the trial hereof; and I am informed and believe that he took an active part in bringing about the verdict in favor of the defendant herein; and I am also informed and believe that he made up his mind to give a verdict for the defendant before the action was tried; but I had no such knowledge until after the case was disposed of, and since the trial I have been informed and believe that the said William A. Lovett stated, and I believe the same to be true, that the defendant had been for some time previous, and was at the time of the trial, the family physician of the said Lovett, and the said Lovett was a warm personal friend of the defendant, and the said Lovett was not sufficiently unbiased in his mind to give an impartial verdict in this action."

The defendant on shewing cause against the order *nisi* filed affidavits made by himself, William A. Lovett, and John Wilkins, and by two jurors, Julius Grossman and Richard Russell, who were of the panel that tried the cause.

The defendant, in his affidavit, swore (3) "With the exception of William A. Lovett, I did not know even by sight any of the jurymen who were sworn and called in this cause. And I further say, that I never at any time previous to the verdict herein being rendered in my favour, spoke to a single one of the said jurymen about the case or anything in connection therewith; or by act or word tried to influence any of them in my behalf; and I verily believe there was not one of said jurymen who were in the slightest degree prejudiced or biased from any cause whatever in my favour. (4) The said Charles W. DeWitt was challenged on my behalf, by reason of my having been informed by two or three different parties, that the said DeWitt by his remarks was prejudiced against me in this case. And I also understood that he was connected by marriage in some way with the plaintiff's family. (5) And with reference to the second paragraph of the affidavit of said DeWitt, I say that my being at the Victoria Hotel on the occasion referred to when I saw him and also John Wilkins therein referred to, was not pre-arranged in any way; but I happened to be there, as I was in the city on the occasion, and had put my horse up at the stables of said hotel; and I have read the affidavit of the said John Wilkins, this day sworn to, with reference to what took place between him and me on the said occasion, and I say that the same is correct. (6) As to the jurymen, William A. Lovett * * I say that I had not seen or spoken to him on any matter for at least two months before the trial, and never spoke to him about the case, nor have I been in attendance upon him or his family for over a year, and prior to that time only occasionally, and was not the only physician who treated his family since I first treated them; and I say further that there is no special intimacy between the said Lovett and myself. (7) As to the affidavit of Morgan Shaver, I say that on the day the trial began I happened to meet the said Shaver on John Street, in the City of Hamilton, and reference was made to the suit pending against me at the Assizes, and I made the remark to him that in such cases

I understood that the defendant was entitled to the benefit of the doubt; and I stated to him if he should be on the jury, he should pay close attention to the evidence; but I did not attempt to use any influence upon the said Shaver, nor did I tell him anything about the parts that I relied upon; and the whole conversation did not take more than two or three minutes; and I had no reason to suppose that I could influence the said Shaver, nor had I any intention of prejudicing his mind in my favour."

The juror, William Andrew Lovett, swore (2) "I remember the interview I had with said Hill, and referred to in the fourth paragraph of his said affidavit; and I say that while there were some remarks made as to his good fortune in not being a juror on many cases and as to how long this case might last, I say most emphatically that the said Hill did not ask me on that occasion, nor on any other occasion, how I was going on this case, nor did I ever tell or intimate to him that I was going in favour of the defendant, or anything to that effect; and I say that what the said Thomas Small Hill states in the fourth paragraph of the said affidavit in that behalf is entirely untrue. (3) The defendant never spoke to me about the case or about anything in connection therewith until after the verdict, nor in any way did he try to influence me as a juror. Nor did anyone else try to influence me in favour of the defendant. And I say further that I was not influenced in joining in the verdict herein in favour of the defendant by anything whatever except the evidence adduced at the trial herein. (4) Referring to the 8th paragraph of the affidavit of the above-named Edmund VanMere, I say that I did not take an active part in bringing about a verdict in favour of the defendant, beyond what my duty as a jurymen imposed upon me. And I say most distinctly that I had not made up my mind upon the case before the same was tried; and I say, that while it is true that it is over a year ago, and not since, the defendant acted as my family physician, I am not on more intimate terms with him than with other physicians who have attended my family during the last few years."

John Wilkins, swore (1) "I have heard read what purports to be a copy of an affidavit made by Charles Wilbert DeWitt. (2) With reference to the second paragraph of the said affidavit, I say that I remember meeting the said DeWitt at the Victoria Hotel, on or about the 2nd day of January, 1886, and remember that the suit of *VanMere v. Farewell*, was spoken of between us, coming on at the coming Assizes ; and I asked him if he knew about the particulars of the case, and he replied that VanMere was suing for \$5,000, which he did not think was too much ; but he said further that he did not know very much about the particulars, but he expected he would as he was a jurymen. I then said if he was a jurymen I did not want to talk to him any more about it, as he might be called on the case. And I say most positively that I did not know the said DeWitt was to be a jurymen till he told me, and that I did not ask him whether he was on the jury or whether he knew any of the jurors, nor was I ever asked by the defendant to interview or canvass the said DeWitt, nor did I in any way by word or act, attempt to influence him as such jurymen. (3) It is true as stated in the said affidavit that shortly after the said conversation, I met the defendant at the said hotel, but before I met him I had not the slightest intimation that he was to be there, but our meeting was purely accidental, and when I met him I asked him about Dr. Bethune, an old friend of mine, whom I had heard had recently been at his place, and while the defendant and myself were talking about Dr. Bethune, DeWitt came into the room where we were, and I then incidentally remarked to the defendant that Mr. DeWitt was one of the jurymen, and had stated to me that in his opinion the \$5,000 claimed was not too much. To which the defendant replied, DeWitt had better wait till he heard the evidence in the case before he expressed his opinion."

The affidavits of the jurymen Richard Russell and Julius Grossman were to the like effect.

June 26, 1886. CAMERON, C.J.—On the evidence it would be impossible for the court to interfere. There is evidence that would justify a jury finding for the plaintiff, but on the other hand the evidence equally justifies the finding in favour of the defendant. It cannot be said that the use of the primary bandage was bad surgery so as to demonstrate a want on the part of the defendant of that degree of professional skill that would shew him unqualified to treat a case of that kind. Whether it should be used or not is one of those questions upon which there is not a general consensus of opinion among the profession; and the fact that one professional man, or a number of professional men, would not resort to the use of a primary bandage, while other members of the profession would, does not make its use evidence of the want of skill in him who uses it, that would be actionable. On this head there was a difference of opinion among the medical men examined, so that the plaintiff must fail as to that.

Then as to the neglect and want of care on the defendant's part in applying the bandages and placing the injured arm in the proper position. If the mother, father, and servant-man of the plaintiff's father, are to be relied upon, it was applied too tightly and the hand was placed with the palm down; but, according to the defendant and the evidence of Rebecca VanMere, the aunt of the plaintiff, the bandage was not too tight, and the hand was placed with the palm towards the body and the thumb upwards, which would not be improper treatment, though there was again a difference of opinion among the medical men as to the proper position of the hand.

Then, assuming the treatment had not in this respect been proper, there was a difference of opinion again among the medical witnesses as to whether the unfortunate present condition of the arm was attributable to the tight bandaging, or was only what might have occurred with the most approved surgery. If one were to judge by the probabilities, it is difficult to believe that a man with any

reasonable degree of professional skill or knowledge would have left the bandages on too tightly when warned by the plaintiff's mother that the hand was swollen and discolored.

It is in the interest of every medical man on account of his professional reputation, to do the very best he can for a patient, and when he takes the trouble to visit the patient as often as the nature of the case may require, it is hardly credible that when at the bed-side he would not do all that in his judgment ought to be done for the relief and cure of the patient.

I am, therefore, clearly of opinion the defendant cannot properly or justly be deprived of his verdict on account of anything shewn by the evidence.

It remains to be considered whether any misconduct is made out by the affidavits in connection with the jury. The only thing that has been shewn connecting the defendant personally with an attempt to influence any member of the panel, is what is shewn in the affidavit of Shaver; and that goes no further than to shew that the defendant asked him to give him the benefit of any doubt he might have. This was certainly a mild interference on his part, and can scarcely be said to be an attempt to exercise undue influence. Strictly speaking it was asking no more than what the law requires. The plaintiff in all cases of alleged wrong must prove the wrong complained of, and if it is left in reasonable doubt whether the wrong has been committed, the plaintiff fails to make out a case. At the same time it is a matter of regret that the defendant should have made any reference to his case or rights to a juror, or knowingly in the presence of one; and unless it could be brought home to a plaintiff or defendant that he had directly or indirectly attempted to influence some one or more of the jurors who tried the case, the attempt to influence other jurors not concerned in the case, but who might possibly have been of the panel, would not in strictness warrant an interference with a verdict that was not clearly wrong upon the evidence.

I should, however, in such a case, be strongly inclined to set the verdict aside on the principle that where a candidate has been guilty of bribery at an election, the election should be avoided, though the bribery proved might not have affected the result; for there is nothing more important than that litigants should be made thoroughly to understand that any attempt to unduly influence the due course of justice by interference with the jury or those whose duty it is to decide between them, will prevent the enjoyment of any success that may actually or possibly be obtained thereby; and, if it had been made to appear that the defendant in this case had gone among the jury and talked his case over with them before the trial, I should have felt it my duty to take the opinion of another jury upon the case. What took place falls very short of that. The case made by the affidavits filed by the plaintiff is completely displaced by those filed on behalf of the defendant in answer.

I refer to the language of Sir William Erle, in *Regina v. Murphy*, L. R. 2 P.C. 535, at p. 549, as indicating how far the facts shewn in this case fall short of misconduct on the part of the defendant, sufficient to avoid the verdict in his favour. It is as follows: "We do not examine the authorities cited for the respondent, because none of them appear to us to sanction the notion that a verdict, even in a civil case, could be set aside upon an imagination of some wrong without any proof of reality. The suggestions upon which verdicts have been so set aside in civil cases have alleged traversable facts material and relevant, to shew that the verdict had actually resulted from improper influence, and we refer to the special verdict reported in XI. H. 4, Fo. 17, as affording an example of such facts as would, if stated in a suggestion, on the record have had the effect of setting aside the verdict."

The case cited from the Year Book is translated, and shews that the plaintiff had given to a jurymen on the panel a writing to be used in case of need for evidence, and this the jurymen shewed to the other jurors, and the officer in charge of the jury reported the matter to the court.

There remains to be considered the point raised by the order *nisi* of the rejection of evidence. The plaintiff gave evidence in support of her case of the alleged improper treatment by tight bandaging, &c. Then the defendant was called on his own behalf and gave an account of the case and his treatment of it. The only medical witness called by the defendant was asked by the defendant's counsel: "Q. Did you hear Dr. Farewell's account of the way in which he treated this arm? A. I did. Q. In view of the surgery laid down by the primary bandage doctors, what do you say of that treatment? A. I see nothing to condemn in the treatment on these principles." On cross-examination he was asked: Q. "You have given your opinion upon the statement made by Dr. Farewell in the box? A. I have heard all the evidence in the case. Q. But you have taken Dr. Farewell's statement as being the facts on which you have based your opinion? A. I am in this difficulty. I have heard the evidence given by some of the witnesses on the other side, and some of those said that red was purple, and purple was black. Q. I would not assume that you came here for the purpose of bolstering up Dr. Farewell. Do I understand your opinion to be given to-day from what you heard from Dr. Farewell in the box? A. I gave my opinion from what I heard Dr. Farewell state, and also from what I heard throughout. Q. The question of my learned friend was, from Dr. Farewell's statement what was your opinion as to the treatment; now do you wish to say from the statement of Dr. Farewell and all the witnesses that the Doctor's treatment was correct? A. On the principles of the treatment adopted, I would. Q. You say the result is the result of good surgery? A. No that's another question. The result has nothing to do very often, with the surgery. Q. Would you say that was the result of good surgery? A. I could not say the result was good, but I could not say it was bad surgery."

Mr. Robertson, at the close of the case for the defendant, according to the shorthand reporter's note, offered to give

medical evidence based on the statement of the case by the defendant. Objected to, and objection sustained.

I am not prepared to say that if the defendant had by the his evidence shewn a course of treatment different from that indicated by the evidence for the plaintiff, and not covered by that evidence, the plaintiff would not have had in reply the right to shew such new treatment would have been objectionable. But here the alleged malpractice, was the use of the primary bandage and applying it too tightly. The use of the primary bandage was admitted and justified as proper. That it was applied too tightly was asserted on the one hand, and denied on the other; and it was admitted, if the bandage had been too tightly applied or allowed to remain too long after becoming tight by the swelling of the arm, it would have been bad surgery. The issue was one therefore rather upon the facts as to what the treatment had been, and there was no room for medical opinion by way of reply to the defence.

I am, therefore, of opinion that the rejection of the evidence offered in rebuttal was proper; and the plaintiff's order must fail as to this ground as well as to the others.

GALT and ROSE, JJ., concurred.

Order nisi discharged.

[COMMON PLEAS DIVISION.]

THE CORPORATION OF THE TOWNSHIP OF ST. VINCENT V.
GREENFIELD.

*By-law to establish road—Boundaries—Omitting to state—Invalidity—
Statute labour—Performance, evidence of.*

A by-law to establish a road must on its face show the boundaries of the road or refer to some document wherein they are defined; and the intention of the framers of the by-law cannot be ascertained by extrinsic evidence.

Held, therefore that a by-law, to establish a road on a blind line between two concessions in the plaintiff's township was, by reason of such omission, invalid.

Held, also, that there was not sufficient evidence given of statute labour having been performed on the road, so as by reason thereof to make it a highway.

THIS was an action brought by the plaintiffs against the defendant for obstructing an alleged highway in the township, by erecting and maintaining a fence thereon, and thereby enclosing part of said alleged highway with his adjoining lands, the north half of lot 32, and the south half of lot 33 in the 12th concession of St. Vincent.

The cause was tried before Armour, J., and a jury, at Owen Sound, at the Spring Assizes of 1886.

The question was, as to the validity of a by-law passed by the plaintiffs on the 26th November, 1864, for establishing the road, and, even if invalid, whether the road had been established by the performance of statute labour thereon.

The plaintiffs set up that at the time the by-law was passed, Donovan, a Provincial land surveyor, had laid out a road on the ground four rods wide, taking the blind line as the centre. The evidence, however, only shewed that he had traced out the blind line, but not that he had staked it out or had run lines on each side of it at the distance of two rods from the blind line to mark the boundaries of the road. Sing, a Provincial land surveyor, was called by plaintiff to shew where the blind line was.

The plaintiffs also set up that statute labour had been

performed, and public money had been expended on the road ever since the by-law was passed.

The defendant contended that whatever statute labour was performed on the road was done on the east side of the blind line, the defendant's land being on the west side; and that the road at the best was only a waggon track through the bush, and that the evidence shewed that he had not encroached on the worn way; and that Sing's evidence did not satisfactorily shew the true position of the blind line.

The plaintiff also set up that the defendant had been convicted for obstructing the road, and a fine and costs were imposed upon him; and that he acquiesced in his conviction; and was therefore now estopped from denying the existence of the road and his obstruction of it.

The defendant shewed, that at the hearing of the complaint before the magistrate, he objected to the jurisdiction of the magistrate, and claimed that the fence was on his own land and not on the highway, but the magistrate persisted in convicting him. The defendant immediately notified the plaintiffs that, in the event of any attempt being made to enforce the conviction, he would move to have it quashed: that no attempt was afterwards made to do so; and that he had never paid any portion of the fine or costs imposed, and had in no way acknowledged or acquiesced in the conviction.

The additional facts, so far as material, are set out in the judgment.

The learned Judge found that in the year of 1864, a common and public highway was established between the 11th and 12th concessions from the side line, between lots 30, 31, and 36: that such highway was intended to be, and was surveyed and laid out on the ground one chain in width, and equally upon each concession: that the line run by Provincial Land Surveyor Sing, and deposed to by him at the trial, was the true limit between the said concessions, and that the said highway had continued to be such ever since it was surveyed and laid out; and that the

defendant had encroached upon and obstructed the said highway by enclosing a part thereof into his lands, the north half of 32, and the south half of lot 33.

The learned Judge therefore directed judgment to be entered for the plaintiffs.

In Easter sittings, *A. Frost*, moved on notice to set aside the judgment entered for the plaintiffs, and to enter judgment for the defendant.

During the same sittings, May 29, 1886, *A. Frost* supported the motion, and referred to *Regina v. Rankin*, 16 U. C. R. 304; *Regina v. Plunkett*, 21 U. C. R. 536; *Regina v. Great Western R. W. Co.*, 32 U. C. R. 506; *Grand Hotel Co. v. Cross*, 44 U. C. R. 153; *Regina v. Hall*, 17 C. P. 282; *Waldie v. Burlington*, 7 O. R. 193; *Dunlop v. Township of York*, 16 Gr. 216; *Regina v. Donaldson*, 24 C. P. 148; *Rex v. Sanderson*, 3 O. S. 103; *Dennis v. Hughes*, 8 U. C. R. 444, 451.

Creasor, Q. C., contra, referred to *Prouse v. Glenney*, 13 C. P. 560; *Gilchrist v. Corporation of Carden*, 26 C. P. 1; *Wannamaker v. Green*, 10 O. R. 457; *Angell on Highways*, 2nd ed., 135.

June 26, 1886. CAMERON, C. J.—The rights of the parties to this action depend upon the proper answer to be given to two questions. First, was the by-law passed by the plaintiff's corporation on the 26th day of November, 1864, legally sufficient to establish a road on the blind line between the 11th and 12th concessions of the said township, in rear of the defendant's lots 32 and 33, in the said 12th concession, thirty-three feet in width, on each side of the said blind line; or was the said by-law wholly void and inoperative? And, secondly, if the said by-law was inoperative and void, was there such a road established by the performance of statute labour thereon?

The material parts of the by-law necessary to be considered in answering the first question are as follows:

“Whereas it is necessary and expedient to establish certain roads within the township of St. Vincent, the municipal council enacts as follows: That the roads, as hereinafter described, shall be and are hereby established permanent highways * * * namely, 1st. A road commencing at a post planted to designate the centre of the two concessions 7 and 8, in the north side of the road allowance, between lots 9 and 10.”

Then follows a precise description of the course of the road, and a declaration that said road is to be four rods in width, that is two rods on each side of the line running from said road.

Second.—“[A road on the boundary line between the 11th and 12th concessions in the said township, from the line between lot No. 30 and lot 31, to the line between lot 35 and lot 36.”

No width is assigned by the by-law to this last-mentioned road; and in consequence of this omission the defendant contends the by-law is inoperative to deprive him or his predecessors in title of the land that the plaintiffs contend has been taken from the rear of his lots for the said road.

Previous to the passing of the by-law in question, a by-law numbered 7 for the year 1861, had been passed on the 28th day of September, 1861, to establish a road, commencing at the southerly limit of lot 36, thence north between the 11th and 12th concessions to the southerly limit of lot 39, said road to be one chain in width.

The by-law of the 26th November 1864, was passed by the council on a petition setting forth that some of the petitioners were so situated that they had no established road to their land, and could not get to their places without trespassing: that if a line of road was established between the 11th and 12th concessions from the side road 30 and 31 to 36, where said line is already established, it would fully accommodate petitioners, and would also be a great convenience to many others for general travel.

The petition was not dated; but the following consent purporting to be signed by thirteen of the petitioners, dated 3rd June, 1864, was given to the council:

“We, the undersigned, hereby consent to give the right of way for the road on the line between the 11th and 12th concessions, St. Vincent, being lots 31, 32, 33, 34, 35 of said concession.”

The word concession is so written, it is difficult to say whether it is concession or concessions. All the signers except two, James Lemon and William Kirvan, resided in the 11th concession. James Lemon resided on the north part of lot 31, in the 12th concession.

At the time the by-law was passed, the owners of the south half of 33, and the north part of 32 in the 12th concession, resided in the county of York.

The defendant became the owner of the south part of 33 in 1868, and of the north part of 32 in 1878, after the by-law was passed.

It did not appear in evidence what the notices of intention to pass the by-law contained, but the resolution of the council authorizing the clerk to give notice, was as follows :

Resolved, that the clerk give necessary notice of the intention to pass the by-law to establish a road from lot 30 to 36, between the 11th and 12th concessions."

On the 20th July, 1867, the council passed a resolution to appropriate the sum of \$7.00, for the road between concession 11 and 12, on lots 31, 32, and 33, provided the settlers there expended a similar sum on said road; and there were sums appropriated from time to time afterwards to be expended on the line.

The by-law, on the authorities referred to on the argument, could not be supported on account of the omission to define the boundaries of the road intended to be thereby established.

As I understand these authorities, the by-law on its face must shew the boundaries of the road, or refer to some document wherein they are defined, and the intention of the framers of the by-law cannot be ascertained by the aid of extrinsic evidence.

The latest case dealing with the question is *Wannamaker v. Green*, 10 O. R. 457. It is the converse of the present case, as there the by-law under consideration had been passed to close up a road; but the clause of the Municipal Act defining the formalities to be observed for

opening and closing a road under which that case was decided, is the same. And Armour, J., in giving judgment, at p. 467, said: "The words of this section are very strong, and seem to me to be imperative"; and after reciting the clause, he adds: "It was proved that six notices were posted up in connection with this by-law in the most public places in the locality, but it was not shewn where they were posted up, nor what they contained. It was also proved that a notice was published weekly, but not for at least four successive weeks, in the *Weekly Intelligencer*, a newspaper published in Belleville, the county town; but it was not shewn what that notice contained. It is clear, therefore, that the provisions of this section as to the posting up and publishing of the notices, were not proved to have been complied with; and if these provisions, as to posting up and publishing the notices, were conditions precedent to the right of the council to pass this by-law, the by-law must fall, and this action, which is based solely on this by-law, must fall too. I think they must be held to be conditions precedent to the right of the council to pass such a by-law, and that they have not been sufficiently complied with to enable the council to pass this by-law. It is to be borne in mind that this is not the case of an application by the defendants to quash the by-law in question, where the court might or might not give effect to the objection as to the posting up and publishing of the notices, although I think they ought; but it is the case of a plaintiff bringing an action which he can maintain only by establishing this to be a valid by-law, and to do this it is necessary for him to shew that the conditions precedent to the right of the council to pass this by-law have been complied with."

I have made this lengthened extract from the learned Judge's remarks as exceedingly pertinent to the want of proof of the preliminary steps having been taken with respect to the present by-law to give the plaintiffs' council jurisdiction to pass it.

It does not appear that notices of the intention to pass

the by-law were put up or published, or, if put up, what they contained. It is fair to presume they did not contain more than the resolution authorizing the clerk of the council to give the notice or the petition praying for the passing; and these both fail to define the exact location or boundaries of the proposed road.

Then on page 469 he deals with the important infirmity in the by-law in not defining clearly the road to be closed.

"I think," he says, "by-law 277 is void, also for uncertainty, for the fact is, that the road in question is not the only road running across lot 15 in the 7th concession of Sidney, and there is nothing in the by-law to shew which road is meant."

The majority of the cases in our Courts have had reference to by-laws for the closing of roads; but the language of the Judges and principles of decision are equally applicable to the present case; and the language of Sir John Robinson, in the case of *Dennis v. Hughes*, 8 U. C. R. 444, is directly in point, though the judgment of the Court does not turn upon it.

It is at page 451: "Another important consideration is, whether a by-law can be good which authorizes a road three rods wide through a man's land, but does not state where it is to enter his land, or what course it is to take through it; so that no one looking at the by-law can see whether it is such a road as the council had power to lay out, nor for what amount of injury he could claim compensation. Is the reference to the surveyor's report sufficient without annexing it to the by-law, or even averring it to be remaining among the records or archives of the council? I apprehend not, though it admits of question."

Then the same learned Judge authoritatively determines the point in delivering the judgment of the Court of Queen's Bench in *Re Smith and Municipal Council of Euphemia*, 8 U. C. R. 222, where he says, at p. 223: "But we consider the by-law bad in not assigning any width to the road, and not even saying that the line described is to be the centre of the road or the outer limit of it on one side or the other."

This by-law provides for the opening a road on the boundary line between the 11th and 12th concessions. What does on "the boundary line" mean? It can hardly be said to mean on each side of it; and a road cannot be opened exactly on the line, for a line has no breadth and could not contain a road. Then it might have been the intention of the council to make the road entirely on one side of the line, or partly on one side or partly on the other, and there is nothing in the writing to give the slightest indication of the intention, unless the petition for the road can be taken as evidencing the legislative intention of the council.

Assuming this to be so, a reference to the petition furnishes but very weak evidence. It is to be found in the 2nd paragraph as follows: "If a line of road was established between the 11th and 12th concessions from side road 30 and 31 to 36, where said line is already established, it would fully accommodate your petitioners."

Of course it may be the subject of reasonable conjecture that the words "line is already established," mean "road," is already established, and that the petitioners desired that road to be continued. But the petition is not in any way referred to in the by-law, and the by-law does not mention a previously established road; and *non constat*, that opening the road on either the 11th or 12th concessions, it would not have served all the purposes of the petitioners.

The attempt of the council by the present proceeding is to expropriate private property without the consent of the owner, and without making him any compensation, and it is necessary for the plaintiffs to bring themselves within the law to enable them to do so by shewing that all conditions precedent have been observed and performed. Having regard to the consent given to the plaintiffs' council, to which I have already referred, it is more than probable the council never contemplated having to pay compensation for the land expropriated; and, if that was essential, the by-law might never have been passed; but it

was not competent to the council under the law as it then was to open a new road without making compensation to the person whose property it was necessary to expropriate. To enable the owner to make his claim for compensation, he should have notice of the passing of the intended by-law, and the ratepayers of the time are those who should make such compensation, and not those who come twenty years after.

I am, therefore, of opinion the first question must be answered against the plaintiffs, and the by-law be pronounced invalid.

The second question must now be considered. Had the road in question become a public highway by reason of statute labour having been done thereon ?

The evidence establishes that the road in question as travelled, is all to the east of the defendant's fence ; that is, to the east of the blind line between the 11th and 12th concessions. There is some evidence that after the by-law was passed, at the north east angle of the defendant's land, the road had been chopped out four rods wide, that is, two rods on each side of the line, assuming that the line run by the surveyor Sing, was the true dividing line between the concessions ; but this chopping was only for a short distance, the preponderance of evidence being that the rear part of the defendant's land was in a state of nature up to the alleged line.

I am not aware of any decision that will prove an authority to enable me to determine to what extent the statute labour, alleged to have been performed in this case, goes in establishing the width to be assigned to the road in question, or whether it is only the actual travelled road or *via trita* that must be deemed a highway.

The statute says : " Any roads whereon the public money has been expended for opening the same, or whereon the statute labour has been usually performed, or any roads passing through Indian lands, shall be deemed common public highways : " Municipal Act, 1883, sec. 524.

Road means " an open way or public passage," according

to the Imperial Dictionary ; and it would seem the Legislature must have had such a definition in view when making use of the expression, roads through Indian lands, which generally speaking had no defined boundaries, other than those indicated by the worn-way.

It could hardly be contended that under such language it would be competent for the public to claim the right after sale of any Indian lands over which such a road might pass, to travel wheresoever they would over thirty-three feet on each side of the centre line of such worn-way.

Then can a road which is defined by the wagon track through timbered land, have, by reason of statute labour having been done upon it, accorded to the ground for thirty-three feet on either side of the centre line of such worn-way, the attribute and character of a highway, though such ground is wholly impassable by reason of its being wooded and in a state of nature ?

If a by-law had been passed by these plaintiffs defining the boundary of a road and specifying the width thereof, which by law should be found invalid by reason of some informality in its passing, and statute labour had been done at different points for the full width given to it by the by-law, there would be room for argument, that the performance of such statute labour would give to the road, for the full width mentioned in the by-law, the character of a highway ; but how it is possible to hold that the owner of land over or along which a defined travelled wagon track exists, may, by the performance of statute labour, be deprived thereof, to any greater extent than the space upon which such statute labour is performed, is something that I am unable to appreciate or understand.

When the statute labour on this road was first done, the law permitted a municipality to lay out a road not less than thirty-feet, nor more than ninety-feet ; and in consequence of this provision of the law, it is contended the road on which statute labour is performed, must be at least thirty-feet ; but that is giving to the statute an oper-

ation the language used will not warrant. Councils are prohibited voluntarily from making a highway less than thirty feet in width ; but the statute itself, in consequence of the performance of statute labour on a travelled road, the origin of which is not known, makes such road a highway, no matter what its width may be.

The statute also makes that a highway for the opening of which public money has been expended. But then it is not merely the fact that public money has been expended, it must appear that it was lawfully expended for that purpose ; that is, it was expended for the purpose, and the purpose was then lawful. See *Regina v. Hall*, 17 C. P. 282, 285, which is a strong case against the plaintiffs upon the effect of the statute labour alleged to have been done in this case.

It has not, I think, on the evidence been satisfactorily established where the true line between the 11th and 12th concessions is. The surveyor Sing may have made his survey strictly in accordance with the law ; but enough has not been shewn in his evidence to enable me to form an opinion. He states he made it in accordance with section 62 of the Surveyors' Act. That clause directs the method to be adopted, in concessions laid out like those in St. Vincent, to determine the side lines of lots ; but to determine the length of the side line in each concession, the depth of the concession must be first ascertained, and to determine such depth, it is necessary to ascertain the points of the concession.

The points must be determined by the position of the corner posts of the lots in front on each concession.

What Mr. Sing said he did, is as follows : " I commenced on the 30th and 31st side road. I divided the concession equally, as I could not procure evidence as to the original post at the blind line between the 10th and 11th. I took the bearings of the town line between Sydenham and St. Vincent. I found those two lines converged. There is a difference in the measurement of $14\frac{1}{2}$ links on the side road, 33, 34, and 30 and 31, in the length of the two con-

cessions. After I had run this line across, I was informed a survey was made sometime before by McNabb, and also by Donovan, and that there had been a post planted at the south-west corner of lot 32, in the 11th concession. My line came between McNab's and where Frizel said Donovan came. My survey came between the two of them. There is the true blind line between the two concessions."

I am not able to understand the reference made to the blind line between the 10th and 11th. I do not know whether there are corner posts undisputed at the front of lots 32 and 33 on the 11th and 12th concessions. If there are then the blind line between these lots should be determined by bisecting the distance between the corner posts in the 11th and 12th concessions. If these corner posts are not now in existence, it should so appear in the evidence, before any other method of determining the position of the blind line in the rear of these lots could be recognized as a proper method. It is possible the defendant's fence may have gone further to the east than the east limit of his land; and, if at that point the road has a limit defined by the wagon tracks, it may be he has encroached upon a part of the road on which statute labour has been done so as to give it the attributes of a highway and entitle the plaintiffs to enjoin the defendant against continuing his fence there.

The evidence is too vague to enable me to see that statute labour has been done at any point where the fence has encroached, or that the encroachment is upon the worn way. The burden of proving this was upon the plaintiffs; and, if they failed to do so with reasonable certainty, their action should be dismissed.

The learned Judge at the trial found that in the year 1864 a common and public highway was established between the 11th and 12th concessions from the side line between lots 30 and 31, and lot 36: that such highway was intended to be, and was surveyed and laid out on the ground one chain in width, and equally upon each concession: that the line

run by Provincial Land Surveyor Sing, and deposed to by him at the trial, is the true limit between the said concession, and that the said highway has continued to be such ever since it was surveyed and laid out; and that the defendant has encroached upon and obstructed the said highway by enclosing a part thereof into his lands, the north half of 32, and the south half of 33.

For these findings of fact, the learned Judge gives no reasons, and I am without the light those reasons would probably satisfactorily afford in forming a correct opinion. At present I can only say, if his findings were based upon the validity of the by-law, they are contrary to the authority of adjudged cases.

If his conclusions were derived from the evidence of the performance of statute labour, I am forced to express dissent on the grounds I have above endeavoured to present.

I think this case is quite distinguishable on its facts, and the legal principle to be deduced therefrom from the cases cited at the argument.

In *Wannamaker v. Green*, already referred to, statute labour had been performed annually on a road that had been travelled for twenty-five years. There was no question as to the width of the road upon which the labour had been done as there is here.

In *Prouse v. Glenny*, 13 C. P. 560, the width of the road had been defined, statute labour had been constantly performed upon it, as well as other public moneys spent in building and repairing the bridges on it.

In *Gilchrist v. Corporation of Carden*, 26 C. P. 1, all that was decided was the corporation was liable for the non repair of a road, which private individuals had dedicated to the public, over which the corporation had exercised jurisdiction by making repairs. The road was a highway by the dedication of it, the doing of statute labour was only a circumstance given in evidence to make the defendants liable as shewing the corporation had assumed control over the highway, and their servants had done the

work negligently that led to the injury to the plaintiff, for which the action was brought.

There is, as I have already said, no case decided that determines the effect of the statute with regard to roads whereon statute labour has been performed in a case like the present.

I am forced to the conclusion the defendant is entitled to judgment, though with some reluctance, as I think probably he has acted somewhat unreasonably and is asserting a right that many men of liberal mind would not, under like circumstances, think of asserting. But he is entitled, no matter what his conduct in the matter may have been, to have his case determined upon legal principles; and I am not prepared to say, if the corporation resisted his right to compensation for land taken from him under the by-law for the road, that he could compel them to make compensation.

I think the evidence displaces the allegation in the plaintiffs' statement of claim, that the defendant acquiesced in his conviction; and I do not think the conviction estops him from asserting dominion over his own land, and from resisting an application to enjoin him against making use of such land as he pleases.

The learned Judge in finding as a fact that the surveyor Donovan laid out the road four rods wide, must have so found as a legal consequence of the by-law and the performance of statute labour, and not upon the evidence; for it would seem clear all that Donovan did was to trace the blind line as the centre of the road. He did not stake it out or run lines at the distance of two rods from such line on each side. The evidence of the witness called for the plaintiff, Thomas Brown, shews this very clearly.

I am, therefore, of opinion the judgment of the learned Judge should be set aside, and judgment should be entered for the defendant, dismissing the plaintiffs' action with costs.

GALT and ROSE, JJ., concurred.

Motion allowed.

[COMMON PLEAS DIVISION.]

TOMLINSON V. MORRIS ET AL.

*Sale of goods — Agreement for — Warranty — Action for breach of —
Property passing — Written notice — Waiver.*

By a written agreement the defendants sold a threshing machine for \$500 to the plaintiff, taking an engine in part payment of \$250, the balance to be secured by promissory notes. The right of possession was to be in plaintiff until default, but until payment the right of property was to be in defendants; with a warranty by defendants that with good management the machine would do good work and was superior to any other machine made in Canada, &c.; and if upon starting the machine, the plaintiff, following the printed hints, rules, and directions of defendants, was unable to operate it well, he was to give defendants written notice of the defect, and a reasonable time was to be allowed defendants to get to the machine and remedy the defect, unless they could advise by letter; but if they were unable to make it operate well, &c., and the fault was in the machine, they were to take it back and refund the payments made, or remedy the defective part, but if the fault was through improper management or neglect to observe the printed, &c., directions, the plaintiff was to pay all necessary expenses incurred; and if, plaintiff observing such directions, any part, except belting, failed during the year, through any defect in material, the defendants, on presentation at the manufactory of the defective piece, were to furnish a duplicate thereof, but defects in pieces were not to condemn other parts. Deficiencies in general adaptation for threshing separating, &c., for which alone the machine should be taken back, must be reported ten days after starting the machine, and not after continued use or injury thereto. The defendants had, on the plaintiff's complaint, attended and made alterations in the machine, whereupon the plaintiff used the machine for six weeks, and then sent it back to the defendants, because, as the plaintiff said, it failed to comply with the warranty, and he had no further use for it; but, as defendants understood, to be repaired. The plaintiff did not ask for the return of the engine. No printed hints, &c., were given by defendants, nor written notice of the defect given by plaintiff; and no default was made by plaintiff in payment of the instalments. In an action to recover the \$250, the value of the engine taken as part payment, the redelivery of the notes, and \$500 damages for breach of warranty.

Held, following *Frye v. Milligan*, 10 O. R. 509, that as the property in the machine had not passed to the plaintiff, he could not maintain an action for breach of warranty.

Held, also, that the plaintiff was not entitled to return the machine after the expiration of the ten days, no notice in writing of the defect complained of having been given; and that the fact of the defendants' previous attendance to make alterations, did not constitute a waiver of their right to such notice, as the evidence shewed that when plaintiff sent for defendants he did not intend giving notice with a view of availing himself of the right to rescind; and the starting under the contract must be regarded as that which took place after the machine was so altered.

THIS was an action tried before O'Connor, J., and a jury, at Brantford, at the Spring Assizes of 1886.

The plaintiff sued for a breach of warranty of a threshing machine, called "The Morris Double Dresser Threshing Machine." The warranty was printed at the bottom of an agreement in writing, made on the 20th July, 1885, whereby the defendants agreed to sell, and the plaintiff agreed to buy, subject to the agreement, one of their double dresser drum cylinder threshers for \$500, the defendants to take a Waterous engine No. 60 in part payment of \$250, and the balance by instalments secured by three promissory notes of the plaintiff, payable 1st January, 1886, 1st January, 1887, and 1st July, 1888. It was also agreed that notwithstanding the cash payment or the giving of the notes, the title to the threshing machine was not to pass to the plaintiff, but was to remain the property of the defendants until the full payment of the price and of any obligation given therefor, or for any part thereof. And in default of payment of the notes, all payments made should be considered as rent; but the purchaser was to have possession and to use the same until default made in the payment of the price or some part thereof, when, and in case there should be any such default, the whole price or all notes given therefor should become due and the defendants should be at liberty to resume possession of the said thresher.

The agreement contained these, further, among other provisions:

"It is agreed that Morris & Watts are not to be responsible for delay occasioned by fire or disturbance among employees, or other causes unforeseen, or which could not be prevented by reasonable diligence. * * This agreement is made for the purpose of procuring credit from Morris & Watts for a threshing machine, and the same is delivered to the purchaser on the faith thereof, subject to the above conditions."

Then followed the signature of the plaintiff, and below was printed the following:

"Warranty that with good management our Morris Double Dresser Threshing Machine will do good work, and is superior to any other machine made in Canada, in its adaptation for separating and saving grain from the straw, with less waste, less litterings and less detentions from wet or bad conditioned straw, or bad weather. Conditioned that upon

starting the machine the undersigned purchaser shall intelligently follow the printed hints, rules, and directions of the manufacturers; and if, by so doing, he is unable to make it operate well, written notice stating wherein it fails to satisfy the warranty is to be given by the undersigned purchaser to the dealer or agent through whom he purchased and also to Morris & Watts, * * and reasonable time allowed to get to it and remedy the defect, unless it is of such a nature that they can advise by letter. If they are not able to make it operate well (purchaser rendering necessary and friendly assistance) and the fault is in the machine it is to be taken back and the payments refunded, or the defective part remedied and made the same as their other machines which do work satisfactorily. But if the purchaser fails to make it perform its work through improper management or neglect to observe the printed or written directions, then the purchaser is to pay all necessary expenses incurred. We warrant our drum cylinder with good feeding to thresh clean and fast, and to injure the grain or straw less than any tooth cylinder made. And our machine when intelligently operated and the grain being in fair condition to be threshed; to clean fit for market, to separate most of the seeds and rubbish left in the grain by other makes of machines; to perfectly beard barley and small wheat without injury to the berry or kernal in the smoothing process. Also that beater plates on our drum cylinder will do with care two seasons' work: that our concaves are of steel and will last four seasons at least without repairs, except through injury from accident. But if *any part of said machine*, except belting, fails during the year in consequence of *any defect in material* of said part, and if the purchaser shall have observed the printed or written instructions or directions applicable to the management of such part, then Morris & Watts are to furnish a duplicate of said part free of charge, except freight, after presentation of the defective piece clearly shewing a flaw in material at the factory, or to the dealer through whom the machine was bought at any time within the year, but deficiencies in pieces not to condemn other parts, and deficiencies in general adaptation for threshing, separating and cleaning (which alone involves the taking back the machine) are expressly agreed by the undersigned to be reported as above stated within ten days after starting it, and not after continued use or injury to the machine.

Signed,

STEPHEN TOMLINSON,
MORRIS & WATTS."

The plaintiff in his statement of claim made, among other things not necessary to be considered, the following allegations, (4) The defendants by said agreement promised and agreed with the plaintiff, and represented to the plaintiff and warranted that the said machine was superior to any other machine made in Canada, in its adaption for separating and saving grain from the straw, with less waste less litterings and less detention from wet or bad condi-

tioned straw or bad weather; and the plaintiff so purchased the said threshing machine relying on the representations made and on the said promises and agreement. (5) The said defendants at the same time promised and agreed with the plaintiff that if he was not able to make the said machine operate well and the fault was in the machine, the same was to be taken back and the payments refunded, or the defective part or parts remedied and made the same as their other machines which did work satisfactorily. (7) The plaintiff on the faith of such representations, promises and agreement as aforesaid, and trusting to the skill and judgment of the defendants, took possession of said threshing machine and put it in operation, when it was found that it was wholly unfit for the purposes required : that it failed to separate the grain from the straw, and was slow in its operation, so slow and unsatisfactory in fact that it was found impossible to do enough work to pay the expenses of running the machine. (8) The defendants were duly notified thereof and the defendant, George Williams, went and examined the said threshing machine and tried to make the same work satisfactorily so as to answer the representations and agreements made as aforesaid, but failed to do so. (9) The defendants at the time of the purchase gave to the plaintiff a warranty to the effect that the said threshing machine would do and perform the work in accordance with [the] promises, representations and agreement aforesaid ; and they further warranted that the drum cylinder of the said machine would thresh clean and fast and would injure the grain and straw less than any tooth cylinder made, and, the grain being in a fair condition to be threshed, would clean fit for market, would separate most of the smut and rubbish left in the grain by other machines of different make, and would perfectly beard barley and small wheat without injuring the berry or kernal in the smoothing process. (10) The plaintiff says the said machine did not nor will do good work, and was not and is not superior to any other machine in Canada, in its adaption for separating and saving grain

from the straw with less waste, less litterings, and less detention from wet or bad conditioned straw or bad weather : that the said drum cylinder did not and will not thresh clean and fast or injure the grain and straw less than any tooth cylinder made : that the said machine, the grain being in fair condition for being threshed, did not clean and will not clean fit for the market, or separate most of the seed and rubbish left in the grain by other machines : that it did not and will not smut wheat without injury to the berry or kernal in the smutting process. (11) The defendants also promised and agreed with the plaintiff, that the plaintiff might return the said machine in case it was found deficient in its general adaption for threshing, separating, and cleaning ; and the plaintiff charges as a fact, that the said machine was defective in its general adaption for threshing, separating, and cleaning. (12) The plaintiff found in fact that the said threshing machine and its drum cylinder were perfectly worthless ; and thereupon the said machine was returned to the defendants, and the plaintiff lost his contracts for autumn threshing and incurred a large amount of expense and loss of time in his efforts to make the said machine work satisfactorily, and the plaintiff was injured in his reputation as a thresher and was otherwise greatly damnified. And the plaintiff claimed repayment of the sum of \$250, the delivery of the notes, and \$500 damages for the breaches referred to.

The defendants denied the truth of the plaintiff's allegations, set out in the agreement ; and alleged the only warranty was that contained in the writing, and that George W. Morris examined the machine and it worked excellently.

The plaintiff gave evidence that the machine was delivered to him about the 3rd August, 1885, at the defendants' shop, and was taken by the plaintiff to Moses Emmet's on the following day, where he commenced to thresh. The machine did not work well at first and he sent for Morris. Morris came the next day and cut a piece of the deck which threw the wheat on the straw. Twelve or fourteen inches were taken off. The machine then seemed to keep

the wheat a little better, but not as well as other machines. In about ten days the plaintiff sent to see if they would change the drum cylinder to a spike one, and the plaintiff saw Morris, who said, "I have been round the country and I see the deficiency, and can make improvements, that a tooth cylinder would be better than the drum cylinder," and the plaintiff thought it would because he was better acquainted with it, and Morris told him to do the best he could with it till he came out. Morris afterwards went out with, as the plaintiff expressed it, "some rigs to fix on the machine, and the plaintiff told him, owing to the expense, it would not answer to stop it just then to fix it, but that they were going to thresh at Cookshutt's, which was near defendants, and they would take the machine down to the shop then." The machine was, after being in use about six weeks, sent by the plaintiff to the defendants' shop—at that time the babbit metal on the cylinder had melted—to be repaired; and he said he told the man who took it to tell the defendants to do the best they could with it, that he would not take it again.

The man who took the machine to the shop was not called, he had left the country, and the man who received it said the man who brought it said it was to be repaired.

The plaintiff swore that he had threshed with a tooth cylinder from 800 to 900 bushels in a day, and that he had not threshed more than 400 bushels with the defendant's machine. The plaintiff also swore there was a time when the machine worked well in dry wheat, that it wasted more grain, did not separate the grain from the straw as well as other machines, went too slow, and got clogged in feeding.

Other witnesses gave evidence that the machine worked slowly; would not thresh as much as some other machines, and wasted more grain.

The defendants never furnished the plaintiff with written or printed hints, rules or directions, but the man who was sent out to start the machine showed how the machine was to be worked, and the plaintiff had not within ten days

after the machine was started, or at any time, given the defendants written notice stating wherein the machine failed to satisfy the warranty.

At the close of the plaintiff's case, Mr. Robertson, Q. C., submitted on behalf of the defendants that the plaintiff had not made out a case, on the ground that notice in writing by the terms of the warranty was required to be given and the machine was sent back to be repaired.

The learned Judge ruled that the defendants had waived their right to written notice by sending out to make the alterations in the deck, and allowed the case to go to the jury.

The defendants then gave evidence to shew that the machine was a good machine as warranted and that it worked well.

At the close of the defendants' evidence Mr. Robertson renewed his motion for a nonsuit, on the ground that it was clear the plaintiff had not returned the machine to defendants informing them that it was returned because of the alleged breach of warranty.

The case was allowed to go to the jury, and the learned judge charged the jury commenting on the contradictory nature of the evidence, and after reading the warranty, and remarking upon it said: "Then it goes on that written notice shall be given of defects. You have heard me rule already, and I do not leave it to you because it is a question of law, that attending upon verbal notice amounted to a waiver of their right to written notice. They waived that by attendance. * * If they were not able to make it work well, it was to be taken back. Now that seems to be clear enough. In the first place there is no provision for another notice. Having received one notice, and having attended, it would seem to me to imply that he was to see that it did work properly, and if it turned out that the defect was in the machine, then they were bound to take it back. The plaintiff, I take it from that, was not bound to send it back. So he was relieved to that extent, and his sending it back could not be a waiver, but

rather assistance. Then he did send it back. The only difference with regard to that is this: the plaintiff says he sent with it instructions that they might fix up the part that was melted and do as they pleased, for he would not take it back. Mr. Morris's foreman says he did not receive any instructions of that kind, but merely that it was to be repaired. It is quite certain that both the defendants and their foreman say that it was out of repair in other respects, and you may consider whether sending a machine, which is palpably out of order in other respects, was or was not as good a notice as could be given of the defects complained of, an order that would not lead him at once to a conclusion as to what the difficulty was and enable him to see whether it was a defect in the machine or not. The machine was repaired only in the one respect and has remained there since, the plaintiff saying that he would not have the machine back again. There is an alternative, that instead of returning it back, that the defective part may be remedied and made the same as their other machines; but I don't see how that can follow if the defect was in the principle of the machine, or in more than one material part of it, and at all events it seems to me that it would give to the plaintiff the objection, and not the seller—that the objection would be to the purchaser—for the guarantee must be taken more strongly against him who sells. The working of the machine intelligently is what Mr. Morris most hinged upon in his evidence. He said it was not intelligently operated, and he gives several illustrations to show that it was not and many explanations indicating something of that kind; but I think that must be taken still in connection with the written and printed instructions which were to be given. The intelligence of the purchaser was to be guided by the written or printed instructions; and if he followed these completely he would be presumed to have used it intelligently, and to have fulfilled that condition of the guarantee. That comes in as a difficulty throughout, the want of written or printed instructions, and it does seem to me the acceptance of the guarantee on

the part of the purchaser largely hinges on that, for there it is made a condition again, if he observes those instructions, then the defendants are to furnish a duplicate. There is the point which you have to consider, whether, within the ten days mentioned in the warranty, there was such a report made by the plaintiff to the defendant Morris, as warned him of that which turned out to be a defect in the machine itself, and if you find that there was, I can not see how you can avoid giving a verdict for the plaintiff; but if you find otherwise of course your verdict should be for the defendants. The warranty is a straggling one. I do not think it was drawn by a lawyer, very likely one of their own concoction, and partakes rather more of the nature of an advertisement than a legal warranty. I think if any lawyer had drawn it, there would have been less in it, and yet the substance all there, but the puffing part, I think, was intended as a portion of the advertisement to go with the machine. You will take the contract with you and read it yourselves, and construe it as well as you can in relation to the evidence."

This charge was objected to by the defendant's counsel upon various grounds, the principal of which are set out in the order *nisi*.

The jury rendered their verdict in favour of the plaintiff for \$250, the price of the engine delivered in part payment of the machine; and no damages.

In Easter sittings, May 20, 1886, *Robertson*, Q. C., obtained an order *nisi* calling on the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit or verdict for the defendants entered, on the grounds: (1) That the verdict is against law and evidence. (2) That it was not proved at the trial that that part of the warranty which requires good management was performed by the plaintiff. (3) That no written notice was given by the plaintiff to the defendants as required by the warranty, and the plaintiff, in the absence of such written notice, had not at the time of bringing the action or since against the defendants in respect

of the matters mentioned in the statement of claim and relief sought. (4) The learned Judge erroneously omitted to charge the jury that one of the material parts of the contract was the good management of the machine and thereby misdirected the jury. (5) The learned Judge ruled that it was a material part of the contract or warranty that printed hints, rules and directions should have been furnished to the plaintiff, and that being unperformed the written notice was waived; and in this the jury was misdirected. (6) That the first paragraph of the warranty was not properly construed by the learned Judge; the jury should have been charged and instructed that the plaintiff by his conduct had waived the printed hints, rules and directions; and therein the jury was misdirected. (7) That no breach of alleged warranty was proved at the trial, and the learned Judge should have directed the jury that the plaintiff had not made and stated such a case as entitled him to the relief sought; and they should have been directed to find for the defendant, or the case should have been withdrawn from the jury, and a verdict entered for the defendants; (9) and upon the grounds of misdirection of the learned Judge in telling the jury there was evidence the plaintiff notified the defendants at the time he sent back the machine that he had done so because it had not filled the warranty, and not for the purpose of having the same repaired.

During the same sittings, June 1, 1886, *Robertson*, Q. C. supported the order *nisi*.

Hardy, Q. C., contra, referred to *Lampkin v. Ontario Marine and Fire Ins. Co.*, 12 U. C. R. 578; *Canada Landed Credit Co. v. Canada Agricultural Ins. Co.*, 17 Gr. 418; *Smith v. Commercial Union Ins. Co.*, 33 U. C. R. 69; *Rossiter v. Miller*, 3 App. Cas. 1124; *Cairncross v. Lorimer*, 3 McQueen 827; *Phillips on Evidence*, 5th ed., vol. ii. 668, 812, 3; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. 385; *Benjamin on Sales*, 4th Amer. ed., p. 742, sec. 858; *Burke v. Elliott*, 15 U. C. R. 610; *Wingfield v. Packington*, 2 C. & P. 599; *Wilson v. Freeman*, 3 Camp. 527.

June 23, 1886. CAMERON, C. J.—On the question of the plaintiff's right to damages, apart from the consideration of his right to rescind the contract, the case would seem to be undistinguishable on principle from *Frye v. Milligan*, decided recently in this Division of the High Court. It will be found reported in 10 O. R. 509. The only fact or circumstance in the present case that could be urged as a distinction between the two cases is that in *Frye v. Milligan* the plaintiff had made default in payment of the instalments, and the defendant had a right to resume possession, while here the plaintiff was not in default, and had a right to retain possession of the threshing machine until default. But the principle of the decision in *Frye v. Milligan* is that where property does not pass to a vendee, he cannot maintain an action for breach of warranty of the chattel, as the measure of damage for breach of warranty is the difference in the value of the chattel as warranted and the value in its defective or unsound condition. That principle is as applicable here as in *Frye v. Milligan*.

The right to damages in this case, if the absolute title to the machine passed to the plaintiff, would also depend upon the true construction of the agreement and warranty. If the effect of the agreement was, that if the machine proved not to answer the warranty, the plaintiff had the right to return it; and, if he availed himself of that right, no damages would flow from the fact that the machine did not answer the warranty,—the rescission of the contract by the return of the machine would be all that was stipulated for.

It then becomes material to determine what in fact is the proper interpretation of the agreement and warranty. The agreement to buy and sell was complete without the warranty, and provides simply for the sale and payment of the price of one of the defendants' double dresser drum cylinder threshers, enumerates the parts, there being a machine manufactured and in use known by the name, and so the agreement had relation to a known specified article.

By the agreement itself the right to the possession of the machine was to be in the plaintiff until default; but the right of property was to remain in the defendants till the purchase money or price had been paid. By the warranty the defendants undertake (1), that with good management the machine will do good work; (2) that it is superior to any other machine made in Canada in its adaptation for separating and saving grain from straw with less waste, less litterings, and less detention from wet or bad weather; (3) that the defendants warrant their drum cylinder with good feeding (*a*) to thresh clean and fast, and to injure the grain and straw less than any tooth cylinder made; and (*b*), when intelligently operated, to clean fit for market, to separate most of the seeds and rubbish left in the grain by other makes of machines; (*c*) to perfectly beard barley and smut wheat without injury to the berry or kernal in the smutting process; also, that the steel beater plates on the drum cylinders will do with care two seasons work; (*a*) that the concaves are of steel and will last four seasons without repairs except through injury from accident.

Then the consequences and obligation of the defendants in case of a breach of the warranty are thus stated: Conditioned, that is, if upon starting the machine the plaintiff should intelligently follow the printed hints, rules and directions of the manufacturers; and if, by so doing, he is unable to make it operate well, written notice stating wherein it fails to satisfy the warranty is to be given by him to the defendants, and a reasonable time allowed to get to it and remedy the defect unless it is of such a nature that they (defendants) can advise by letter. If the defendants are not able to make it operate well (the plaintiff rendering necessary and friendly assistance), and the fault is in the machine, it is to be taken back, and the payments refunded, or the defective part remedied and made the same as their other machines which do work satisfactorily.

The evidence discloses that there were no written or printed hints, rules or directions; and the plaintiff contends

that the omission to furnish such written or printed hints, rules, or directions, relieved him from the obligation to give written notice stating wherein the machine failed to satisfy the warranty; and that the attendance of the defendant Morris with his men to make the alteration in the deck while the machine was at Emmets, rendered written notice unnecessary; while the defendants contend that such omission and attendance did not render the giving of notice unnecessary.

The proper effect to be given to the warranty from a common sense point of view, and the effect that must be given to it, is, that in the absence of written or printed hints, rules, or directions, both parties must be assumed to have dispensed with such hints, rules, and directions, and that on failure by the plaintiff to make the machine operate well, it became his duty to give written notice of the failure, if he wished to avail himself of the defendants' agreement to take the machine back and refund the price, or to remedy the defective part so as to make it the same as their other machines that worked satisfactorily. The option was given to the defendants either to take the machine back and refund the money, or to make the machine the same as their other machines that worked satisfactorily, and they were entitled to a written notice stating the particular or particulars in which it failed to satisfy the warranty, so that they might be in a position to decide for themselves which alternative it would be better for them to adopt.

I think in the absence of evidence that one of the defendants had seen the machine and made alterations to it, there could be no reasonable room for doubt that it was incumbent upon the plaintiff to give the written notice.

It then becomes important to consider the effect of the defendant Morris's attendance at Emmet's, and the alterations made there. It is clear to my mind the plaintiff when he sent to the defendants on that occasion did not think he was carrying out the terms of the warranty, and was giving notice under the warranty with a view to

availing himself of the right to rescind the contract, and the starting of the machine referred to in the contract must be regarded as the starting after the defendants had shortened the deck at Emmet's. The plaintiff in his evidence said it then worked better, kept the wheat better, but not as well as other kinds of machines. The defect to be remedied at the time was the waste of grain by reason of the deck being too long, and if the improvement then made was not satisfactory he ought not to have kept on using the machine, but should have notified the defendants under the contract.

I am of opinion the last paragraph of the warranty requires notice in writing to be given within ten days after starting, and that provision is in effect a limitation of the time of trial to ten days, and that after ten days' trial it was not competent to the plaintiff to avail himself of the right to rescind the contract, and keeping it beyond the ten days after starting, without giving such written notice, he was bound to keep the machine, and the defendants were only bound after the expiration of the ten days to supply free of charge such parts of the machine as became out of repair, or failed on account of defective material within a year.

The last paragraph is as follows:—[The learned Chief Justice here read the last clause of the agreement, *ante* p. 313.]

In *Chapman v. Gwyther*, L.R. 1 Q. B. 463, it was held under the following warranty: "June 5, 1865, Mr. C. bought of G. G. a bay horse for ninety pounds, warranted sound. £90. G. G. Warranted sound for one month, G. G.," the words warranted sound for one month, limited the duration of the warranty, and meant the warranty was to continue in force for one month only.

Lush, J., at p. 468, thus expressed his opinion agreeing in the result arrived at by Blackburn and Mellor, JJ.: "We are to put such a meaning, if possible, on the words used as to express the real intention of the parties. Now, it cannot be doubted, that the seller intended, not to extend but

to limit the ordinary liability on a warranty of soundness. If the horse be simply 'warranted sound,' the buyer may claim damages, at any time within the time limited by the statute of limitations, for the breach, by shewing the horse had disease, or the seeds of disease at the time of sale; and the longer time that elapses between the sale and the complaint the more difficult and expensive the question becomes. Therefore, a person dealing in horses might very reasonably say any dispute as to soundness shall be determined within a given time; and the defendant has expressed this in a very compendious form. He must have meant, 'I won't be liable on my warranty unless complaint be made in a month.'"

And Mellor, J., said, at p. 467: "And so looking at the words 'warranted sound for a month,' I think they were intended to impose a limitation in point of time. 'I warrant the horse to be sound, but you shall have a month's time only for trial and examination; and though I do warrant, I only intend to be bound if you discover any defect and make complaint within a month of the sale.' That is what I think the parties must be taken to have intended; and consequently the plaintiff's complaint came too late, and he ought to have been nonsuited."

The plaintiff in that case made complaint on the 9th July; the purchase of the horse having been made on the 5th June. So the plaintiff was only five days late in making complaint according to the terms of the warranty.

Applying the language of the Judges to the present case, it is manifest the parties intended that deficiencies in the adaptation for threshing, separating or cleaning, which alone warranted the return of the machine, "were to be made known in writing within ten days after starting the machine, and not after continued use or injury to the machine." It was not in their contemplation that the machine should be used for a longer period, for instance, for six weeks, and then returned in consequence of the babbit metal in the cylinder melting and rendering it unfit for use till repaired.

There was certainly evidence that went to show the defendants' machine was not superior to other machines in use—that it was not as efficient at all events in threshing the quantity of grain that other machines would do in the same space of time. There was no evidence to show the machine was not adapted to the purpose of threshing, separating, and cleaning the grain—all which it certainly would do, but not as quickly as other machines. The plaintiff admitted threshing 400 bushels in a day, but he said with his old machine he had threshed from 800 to 900, and there was evidence that as much as 1,000 bushels had been threshed in a day with a different machine.

I am of opinion the learned Judge was wrong in telling the jury that the defendants, by altering the machine at Emmet's at the first trial, thereby waived their right to a written notice giving the particular or particulars in which it failed to satisfy the warranty; and the defendants were not thereby deprived of the right to exercise the option they had of trying to make the machine equal to others of theirs that worked satisfactorily; and, if defendants are not entitled to have the action dismissed, there should be a new trial. Whether there was a waiver or not would be a question of fact and should have been left to the jury. If the Judge was of opinion the circumstances furnished evidence of waiver, he should not have ruled, as matter of law, there had been a waiver of written notice. The plaintiff positively stipulates in writing that it is the agreement of the parties, and he expressly agrees to report within ten days any deficiencies in the general adaptation of the machine for threshing, separating and cleaning, which were declared to be the only deficiencies or defects that would warrant a return of the machine.

This case is not at all like the forfeiture of a term in a lease where any act on the part of the landlord after the cause of forfeiture has arisen, only consistent with a continuance of the term, is a waiver of such forfeiture, and the rule in such case has no application to a case like the present. The defendants do not set up that the contract

is at an end, but affirm its continuance, and their attendance to make repairs cannot be treated as a waiver of any stipulation of the contract or warranty.

The cases of waiver cited by Mr. Hardy of *Lambkin v. Ontario Marine and Fire Ins. Co.*, 12 U. C. R. 578; *Canada Landed Credit Co. v. Canada Agricultural Ins. Co.*, 17 Gr. 418; *Smith v. Commercial Union Ins. Co.*, 33 U. C. R. 69, are quite distinguishable. *Rossiter v. Miller*, 3 App. Cas. 1124, also cited, does not appear to have a bearing on the question involved here. It is not disputed that it was competent in the present case for defendants to have waived expressly, or by unmistakable act or conduct shewing an intention to waive, notice in writing.

I base my opinion against the plaintiff's right to recover in the present action under the pleadings on the ground that the act of the defendants in attending and making alterations in the machine at Emmet's was not a waiver, nor even evidence of a waiver of the plaintiff's agreement to give notice in writing of defects in the machine that entitled him to rescind the contract and return the machine. According to the old form of pleadings the plaintiff must have been nonsuited on account of the variance between the contract or warranty set out in the statement of claim, and the one proved in evidence. The plaintiff did not in returning the threshing machine, ask for or demand the engine, and what he is entitled to on the rescission of the contract at his instance, is to be placed in the position he was in before the contract—that is he should get back his engine and not its value, unless delivery of it was refused. The plaintiff did not seek a return of the machine but damages for the breach of warranty and the refund of the \$250 paid according to the solicitor's letter; to which the defendants replied merely that they had fulfilled the contract and expected the plaintiff to fulfil his.

The language of Lord Esher, M. R., in the recent case of *Johnstone v. Milling*, 16 Q. B. D. 460, at p. 467,

in relation to the law respecting rescission of contract may be read with profit in connection with this case. It is, "When one party assumes to renounce the contract; that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation the contract is at an end except for the purposes of the action for such wrongful renunciation; if he does not wish to do so, he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise."

I have made this extract as bearing upon the conduct of the defendants and their rights in respect of their counter claim. They have chosen to consider the contract as existing, and under it they would be entitled to recover the full balance of the price of the threshing machine, though on account of the failure of the plaintiff to pay the note that fell due in January last, though the other notes will not mature for sometime, but I do not think I can direct judgment to be entered for the defendants, for it may be the plaintiff may still have a right to shew that the machine was not as warranted, and to have the defendants' claim in consequence reduced by the difference between the value of the machine as warranted, and its value as it may be shewn to be.

This question has not been discussed, as from the course taken at the trial and the finding of the jury, that became unnecessary.

The defendants should be allowed to withdraw their counter claim without prejudice to their right to renew it in an independent action.

I would refer also to the following cases upon the effect of a contract of sale and return, and the rights of parties thereunder: *Moss v. Sweet*, 16 Q. B. 493, 495, which shews that where goods are delivered on sale or return, they must be returned within a reasonable time, which reasonable time is a question for the jury, and would indicate if the plaintiff in this case was not limited to ten days after starting the machine to make complaint, it was a question for the jury whether retaining the machine after using it for six weeks was reasonable.

A purchaser of goods with a warranty is not at liberty, if the warranty is broken, to return the goods unless his right to do so is expressly given by the contract. In the absence of such stipulation he is left to his remedy by suit on the contract, or by way of defence to reduce the price in an action brought on the contract: *Hinchcliff v. Barwick*, 5 Ex. D. 179, per Bramwell, L. J. and Thesiger, L. J.

The order *nisi* of the defendants must be made absolute to enter judgment for the defendants dismissing the plaintiff's action, with costs.

ROSE, J.—I agree that under *Frye v. Milligan*, the plaintiff is not entitled to recover damages for breach of warranty, the title not having passed from the vendors.

I also agree to the construction placed upon the contract by the learned Chief Justice, that the plaintiffs were not entitled to return the machine after the expiry of the ten days, no notice in writing having been given; and that what took place at Emmet's did not amount to even evidence of a waiver by the defendants of such written notice.

For the reasons given by the learned Chief Justice I think the plaintiffs were not entitled to complain of the want of printed instructions, and I do not find, as a fact, that they did so complain either before or during the trial.

As there may be some answer to a claim for the full price of the machine, I concur in allowing the counterclaim to be withdrawn, and in the judgment for the defendants dismissing the plaintiff's action with costs.

GALT, J., concurred.

Order nisi absolute.

[COMMON PLEAS DIVISION.]

THE QUEEN V. HALPIN.

THE QUEEN V. DALY.

Canada Temperance Act, 1878—Day of adoption—Evidence of accused—Not bound to criminate himself.

On an application to quash a conviction under the Temperance Act, 1878. *Held*, that the adoption of the Act is on the day of polling.

Held, also, that under sec. 123 of the Act, by which the accused is made a competent and compellable witness, he is not bound to criminate himself.

ORDERS *nisi* in these cases were obtained to quash convictions under the Temperance Act of 1878.

On the 28th day of June, 1886, *Robinson*, Q.C., and *G. T. Blackstock*, supported the orders.

Edwards, contra.

June 30, 1886. GALT, J.—There were two questions raised of very general importance, particularly as respects the County of Peterborough, in respect of the first; and generally, as regards the second.

The first is, that the Temperance Act is not in force in the County of Peterborough; and the second, as to the effect of the 123rd sec. of the Act as compelling a defendant to give evidence criminating himself.

As respects the first.

It was admitted that the election took place on 24th September, 1885: that there was a scrutiny which was not completed until the 1st December: that the return was made to the Secretary of State on the 2nd December; and the Order in Council was published on 27th December.

Mr. Blackstock contended that the Act was not adopted until after the return of the returning officer.

Mr. Edwards, on the other hand, argued that "the adoption of the Act is on the day of polling."

I am clearly of opinion that such is the case. The votes are given on a certain day, consequently the Act must have been adopted or rejected on that day.

It is true there may be a scrutiny; but the result of that is simply to ascertain whether the Act had been adopted or rejected. In my opinion the Act is in force in the county of Peterborough; and consequently this objection fails.

The second objection is of great public importance; and had I known more of its character I would have transferred this case to the Divisional Court.

The question is, whether under the 123rd section a person accused is obliged to criminate himself?

The learned police magistrate was of opinion that he is; and consequently, in the discharge of his duty, compelled the defendants to answer certain questions.

This very question has been before the Supreme Court of Prince Edward Island in the case of *The Queen v. Connolly*, 4 Can. L. T. 301, where the Court held that these provisions did "not take away the privilege of the defendant when under examination as a witness to enforce an answer to questions tending to criminate him."

It is true this decision is not binding on me; and, if I was clearly of opinion that it was not law, it would be my duty to disregard it; but, in the absence of any such opinion, I

think it desirable to follow it. It would certainly be singular that the same statute should receive a different interpretation in different Provinces ; and, if such should hereafter prove to be the case, the Legislature would probably see cause to make such change as they might deem expedient to prevent such a state of affairs.

I therefore give judgment quashing these convictions on this ground. There will be no costs.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

COSTELLO V. HUNTER.

*Husband and wife—Breach of promise of marriage—Corroborative evidence
—Statute of limitations.*

In an action for breach of promise of marriage, the plaintiff stated that the defendant promised to marry her in the fall of 1873, but when that time had arrived he excused his doing so, because he said he had not his house built, and he agreed not to marry until he had a suitable house. The plaintiff told him she was willing to live in a shanty, and he said he would not marry until he could keep plaintiff. The house was built in the summer of 1878. No definite promise was proved after the fall of 1873, but the plaintiff and defendant kept up friendly relations until 1884, when the defendant married another woman, and this action was brought. The defendant denied the promise. In his examination before the trial, he admitted visiting the plaintiff and of talking to her of marriage, but he said it was not of their marriage, but that of other persons: that when he visited her she was alone, and that he kissed her. In corroboration of the plaintiff's evidence, a witness stated that in the fall of 1882, he had a conversation with the plaintiff, who, referring to some girls who visited his house, said he was not going to marry those who wanted his house, but the girl who wanted him; and on witness saying he supposed this was the plaintiff, the defendant answered "yes." The witness stated that in the next spring, or the following one, he had a further conversation with defendant, when defendant said he was either going to rent or sell his house or get married, when witness said he supposed plaintiff and defendant would soon make a match, to which the defendant made no reply.

At the trial it was objected that there was no evidence to corroborate the plaintiff's evidence as to the alleged promise, and that the action was barred by the Statute of Limitations. The learned Judge overruled the objection, and left the case to the jury.

Held, that the action was not maintainable.

Per CAMERON, C. J.—There was evidence to go to the jury corroborative of the promise stated by plaintiff; but, *per* CAMERON, C. J., and ROSE, J., the action was barred by the Statute of Limitations, the latter expressing no opinion as to the corroborative evidence.

Per GALT, J., without dissenting as to Statute of Limitations, the plaintiff's evidence was not sufficiently corroborated.

THIS was an action for breach of promise of marriage.

The promise as stated in the plaintiff's statement of claim was, that she and the defendant agreed to marry one another within a reasonable time.

The defendant, besides denying the promise, pleaded that the plaintiff's cause of action accrued more than six years before the commencement of the suit.

The cause was tried before O'Connor, J., and a jury, at Hamilton, at the Spring Assizes of 1886.

According to the evidence of the plaintiff the defendant agreed in 1873 to marry her in the fall of that year. When the fall came he offered as an excuse for not then marrying, that he had not built his house. She said she did not know what she said when he made the excuse: "I did not object to wait longer. I think I said he would never get married. He said he would, and no one but me. I said I could live in a shanty, and he said he would not marry me till he could keep me." The defendant built his house in the summer of 1878. There was no definite time fixed for the marriage after the fall of 1873, but the plaintiff and defendant kept up a friendly intercourse without seeing each other very frequently, until the plaintiff heard in 1884, that the defendant was going to marry another woman, when she wrote to the defendant to come and see her, which he did, and then said he was keeping company with another woman whom he afterward married before this action was brought.

In cross-examination the plaintiff said, after the fall of 1873, no definite time was fixed for the marriage, and she did not ask him or press him to fix the time.

To corroborate the plaintiff, Thomas Arnold a witness was called, and swore that in the fall of 1882, he had a conversation with the defendant, and gave the following evidence: "He asked me if I took notice of the young women that were running backward and forward there? I said yes, I could not help but take notice of that. Well, he said, what do you suppose they are after? Well, I said I suppose they are after you. The answer that he made me was, that they were not after him, they were after his brick house, but they were not going to get it, none of them. He says, I am going to take the one that wants me, not the one that wants the house. I said, 'I suppose that is Ann Costello'? and he said 'yes.'"

On another occasion the witness had a conversation with the defendant, which he gave as follows: "It might have been the next spring or the spring after that he came to my place. I suppose he had not been very well pleased at

something during the day ; he said he was going to do one thing out of three. I said, 'Andy what is that'? Well, he said, 'I am either going to rent my place, or sell it, or get married.' Then I said 'I suppose you and Ann Costello will soon make the match then?' I do not think he made any answer."

The plaintiff put in as part of her case the examination of the defendant before Mr Sadlier, special examiner, in which he admitted visiting the plaintiff and speaking to her on the subject of marriage, but the marriage of other people : that he saw the plaintiff alone when he visited her, and kissed her ; but denied ever promising to marry her.

At the close of the evidence the defendant's counsel, Mr. MacKelcan objected there was no evidence to corroborate the plaintiff's evidence as to the alleged promise ; and as there was no promise proved, except that made in the spring of 1873 to marry in the fall of that year, the right to bring the action was barred by the Statute of Limitations.

The learned Judge overuled the objections, and left the case to the jury.

The learned Judge, on the question of corroboration of the plaintiff's evidence, gave the following direction to the jury : "A good deal has been said about corroborative evidence, and I think the counsel who commented upon that confused two distinct and different things. He confounded corroborative evidence with principal evidence. They are different things altogether. If the test put to you by the learned counsel was a correct one, there would be no object whatever in the statute which permits the plaintiff to give evidence in these cases of the promise. If there was sufficient evidence without her own evidence, she would not require to give evidence at all. Corroborative evidence is not of that character. The meaning of corroborative evidence, putting it in a short way, is such evidence as makes the evidence of the principal highly probable. Her evidence may be supported by facts, by surrounding circumstances, by the conduct of the defend-

ant, and by his cross-examination. If altogether there is such evidence as makes her story a highly probable one, that is sufficient, and there is corroborative evidence of her principal evidence." The learned judge then referred to some of the evidence in detail, showing the intimacy between the plaintiff and defendant, to the making love when visiting, and at times kissing the plaintiff, and said: "If you believe that was not making love you are not bound to be influenced by it. Then there is the further evidence in corroboration of the man Arnold. Arnold seemed to give his evidence not only clearly, but I should fancy, honestly. But you have to weigh the evidence, and not I." He then detailed the evidence of Arnold, and added: "Now there is a positive assertion at all events that he was to marry Ann Costello, and you are to ask yourselves is it usual for any man, or a young man, to say positively that he is going to marry a young lady unless it is a settled thing between them. It would be highly improper for him to say, I am going to marry Ann Costello unless he had Ann Costello's consent, and they were engaged. You may infer from that expression that it does imply an engagement between them. Now, unless evidence of that kind could be taken as corroborative of the main promise it would be almost impossible to prove a promise of marriage in most cases. You know young men, when they are going to, as they say, "pop the question," do not do it in the presence of others as a general thing. He does, to some extent, admit he had a liking for her, but when he is brought directly face to face with the question, did you promise to marry her? he says he did not. Now the question is, was there an engagement? Did that engagement continue notwithstanding his failure to marry in the fall of 1873? Was there such an engagement then as may be held to have been continued, and was his conduct such as to lead her to believe, and to keep her under the impression, that the engagement was continued, and to cause her to rely faithfully on it? If you are satisfied of that, then you are to ask yourselves whether she ever disengaged herself from that engage-

ment. There is no evidence that she did, and she swears that she did not. Of course his marriage to the other young woman was a breach of the engagement. He admits that he did tell the plaintiff, about a month before, that he did not intend to marry her. If you are satisfied on these two points, and that the breach was within six years, your verdict ought to be for the plaintiff. If you are not satisfied that a promise of that kind has been proved, or if she let him off, or that if the breach was more than six years ago, the verdict ought to be for the defendant."

The jury found for the plaintiff with \$400 damages.

In Easter sittings, May 19, 1886, *McGregor* obtained an order *nisi* calling on the plaintiff to shew cause why the verdict should not be set aside and a new trial had, or a nonsuit entered upon the above grounds of objection; and on the ground the verdict was contray to law and evidence, and for misdirection, non-direction; and on grounds disclosed in affidavits and papers filed.

During the same sittings, May 29th, 1886, *Falconbridge*, Q. C., and *Gwyn* (of Dundas), supported the order. The action is barred by the Statute of Limitations. The only promise proved was that made in the spring of 1873, to marry in the fall of that year. The breach occurred in the fall when the defendant saw he could not marry until his house was built, or in 1878 when the house was built. The other side contend that there was a continuing promise, and that the breach occurred when the defendant married his present wife in 1884. There was clearly no promise after the fall of 1873. All that the defendant said was merely by way of excuse. The whole evidence shews an exoneration of the promise. The relationship of the parties shews that it was not intended to carry out his promise. The plaintiff also should have made a request on defendant to marry; *Davis v. Bomford*, 6 H. & N. 245; *Addison* on Contracts, 8th ed., 836; *Stewart* on Marriage and Divorce, secs. 20, 80; *Cole v. Holliday*, 4 Miss. (App.

Cas.) 94; *Prescott v. Gaylor*, 32 Ill. 312. There was no corroborative evidence. The only evidence was that of Arnold, and that was clearly insufficient; and also at the time the conversation took place with Arnold, the statute had run; and if it was evidence at all it related to a promise to marry in 1873; *Bessela v. Stern*, 2 C. P. D. 265; *Willcox v. Godfrey*, 26 L. T. N. S. 328, in App. 481; *Cole v. Cottingham*, 8 C. & P. 75. In any event there should be a new trial on the ground of surprise.

Teetzel, contra. The Statute of Limitations constitutes no bar here. There was clearly a promise proved to marry the plaintiff in the fall of 1873. There was no refusal to marry then so as to constitute a breach of the contract, for which an action could be maintained, but a new promise was then made, and this was renewed from time to time and new promises made until the defendant married another woman in 1884, when the breach occurred, and the statute commenced to run from that period. A promise to marry is different from an ordinary promise, and the promise is renewed at each time of meeting. There was ample corroboratory evidence. Arnold's evidence was sufficient. It is not necessary that there should be evidence to make out the promise; but merely evidence to support the plaintiff's evidence that the promise was made. The conduct of the parties was in itself evidence of corroboration: *Cole v. Manning*, 2 Q. B. D. 611; *Fisher v. Graham*, 31 C. P. 286; *Morrison v. Shaw*, 40 U. C. R. 403. There is no sufficient ground shewn for a new trial on the ground of surprise.

June 26, 1886. CAMERON, C. J.—The charge of the learned Judge does not seem open to any substantial objections. And on the evidence, if the plaintiff was sufficiently corroborated, the jury were warranted in finding the promise established.

The greatest difficulty in the case is presented by the objections taken by Mr. MacKelcan at the close of the plaintiff's case, and renewed by his rule, namely, there was

no evidence to go to the jury at all. And, secondly, if the promise was made out, the right of action was barred by the Statute of Limitations ?

The first question is freer from doubt than the second, as there is more authority bearing upon it.

The corroboration required by the statute is some material evidence in support of the promise. Evidence sufficient to make out the promise is not required, but evidence that will support the promise, which means, I take it, that supports or strengthens the plaintiff's evidence that a promise was made.

If this question was now presented for the first time I should have been disposed to interpret the statute as requiring some evidence that would have direct reference to the promise, and not the mere presentation of circumstances that would be quite as consistent with the non-existence of a promise as with its having been made. Visiting a woman frequently, and kissing her at parting, are things that often occur without a promise of marriage having been made or expected ; and it is difficult to see how such intimacy furnishes any corroboration of the evidence of the plaintiff that the defendant promised to marry her. The most that can be said is, it is quite consistent with the existence of an engagement, but being also consistent with the non-existence of the engagement, I should find very great difficulty in holding it furnishes evidence in support of the promise as required by the statute. At the same time it often happened when the parties were not permitted to give evidence that a promise of marriage had to be made out by circumstances. Then the conduct of the parties towards each was given in evidence to induce the jury to draw the inference that an engagement to marry had been made by them. While I see great danger in admitting as corroborating evidence circumstances that are ambiguous and as consistent with the non-existence of the promise as with the existence of a betrothment, I am unable to say the definition of corroborative evidence given by the learned

Judge at the trial was not correct ; that is to say, evidence that strengthened the probability of the plaintiff's evidence being true ; and so each case must depend upon its own special circumstances in determining whether there is corroboration or not.

It seems impossible to say the account of his conduct furnished by the defendant himself in his examination, coupled with the evidence of Arnold, should not be submitted to the jury as evidence they might consider corroborative of the plaintiff's evidence in support of the promise.

In *Davis v. Bomford*, 6 H. & N. 247, 248, Wilde, B., in dealing with the question of evidence to shew an exoneration from a promise to marry, made reference to the kind of evidence usually resorted to to support the action as follows : " I rest my judgment on the narrow ground, that the promise in an action of this kind, where the parties themselves cannot be called, is usually proved by their conduct. Then the question is, whether the conduct of the parties was such that the jury might infer from it a rescission of the contract. A conversation leading to such a result was proved, after which the parties ceased to see or communicate with each other, or do that which they would naturally or ordinarily do if the promise had continued to subsist. Without saying that I should have found the same verdict, the question was one for the jury, and they have decided it."

I have not found any case of corroborative evidence under our Act that directly bears upon the case, and only one under the English Act, of which ours is a transcript. That is the one cited on the argument by Mr. MacKelcan of *Bessela v. Stern*, 2 C. P. D. 265. The opinion of the Judges in the Court, of first instance—Grove and Denman—is against the sufficiency of Arnold's evidence to support the promise, and the Judges in appeal did not deal with that branch of the case.

The decision in appeal turned entirely upon the effect of the plaintiff's asserting to the defendant that he had

promised to marry her without denial on his part. Taking his silence as an admission, it directly supported the plaintiff's evidence of a promise, and is, I think, the kind of evidence contemplated by the statute, that is, something that related to the making of the promise.

The evidence that was held not to be corroborative of the plaintiff in *Bessela v. Stern*, was as follows: A sister of the plaintiff swore: "In May, I saw the plaintiff was in the family way. I went to see the defendant. I said what have you done? You've got her into such disgrace. What do you mean? He said he would marry her and give her anything, but I must not expose him."

All the authorities, as far as I am aware of, that bear upon the question of what is sufficient corroborative evidence to go to the jury, are considered and reviewed by Armour, J., in *Parker v. Parker*, 32 C. P., beginning at page 127; and I think they would not sanction the withdrawal of this case from the jury.

The remaining question is, has the action been barred by the Statute of Limitations?

Taking the contract to be as put by the plaintiff, that the promise was to marry her in the fall of 1873, and that what took place afterwards only amounted to the continuation of the original promise—in other words, to a confirmation of that promise, and not to the establishment of a fresh or new contract,—the statute is a bar, for the plaintiff's cause of action arose immediately after the fall of 1873; and so in 1879, six years had elapsed after the breach without action having been brought; and no mere oral acknowledgment would be sufficient to prevent or interrupt the running of the statute.

It is the peculiar nature of the contract of marriage that gives rise to difficulty. The defendant offered as an excuse for not marrying in the fall of 1873, that he had not got his house built, and said he would not marry till he had a suitable house to take the plaintiff to. I am not giving his exact words, but their effect. She said she was willing to live in a shanty. Nothing more definite than

this was said at any time afterwards. Then would what took place furnish the defendant with a defence to an action for not marrying the plaintiff in the fall of 1873? If it would not the original promise continued, and there was not a new or substituted agreement to marry when the defendant should build a house subject to the limitation that the house would be built in a reasonable time, or, in other words, a promise to marry within a reasonable time, the reasonableness of the time to be determined by what would be a reasonable time to build a house suitable for their habitation.

In one view it may be said that a promise to marry, where parties, after an engagement, constantly seek each other, and remain on friendly terms, is renewed at each time of meeting as such a contract may be inferred from the conduct of the parties; but this kind of contract is subject to the law relating to ordinary contracts, and, in the absence of express rescission of the original contract, I do not think it can be said there was any evidence in the case that went to establish a new contract. What evidence there is goes rather to support the continuance of the original engagement without objection on the part of the plaintiff to delay in the performance of the contract.

For the position that a contract to marry is subject to the rules that govern other contracts I refer to *Frost v. Knight*, L. R. 7 Ex. 111.

What reasonable ground of distinction is there between this case and that of a party undertaking to pay a sum of money at a particular time, which he fails to do, and every year, or every day in the year for six years, meets his creditor and acknowledges the debt, and promises to pay him?

In the one case there is a promise to pay, in the other a promise to marry, both unfulfilled, and the language of the statute, R. S. O. ch. 117, sec. 1, is as applicable to a contract to marry as a contract to pay.

It is "In all actions * * on simple contract or of debt grounded upon any lending or contract without specialty, * * no acknowledgment or promise by words only shall be

deemed evidence of a new or continuing contract whereby to take the case out of the operation of the Act passed in England * * respecting such actions as aforesaid, or to deprive any party of the benefit thereof unless such acknowledgment or promise is made or contained by or in some writing signed by the "party chargeable thereby."

I have not seen any express decision as to the way in which the time for the running of the statute, where the contract is one to be performed within a reasonable time, is to be ascertained. But it is the breach of the contract that gives the time of commencement for the running of the statute, and what constitutes a reasonable time for performance must depend upon the circumstances of each case. Assuming there was a fresh contract entered into to which the Act, R. S. O. ch. 117, could not apply after the breach to marry in the fall of 1873, it would be a contract to be performed within a reasonable time, and on the evidence the circumstances were such as to shew a reasonable time could not have extended beyond a year from that time, so that the statute began to run, and worked a bar long before the action was brought. It is only upon the assumption that there was a continual renewal of the contract from time to time, or more properly a fresh contract created at every time of meeting to marry within a reasonable time thereafter, that it can be held the contract between the plaintiff and defendant was not barred by the statute; and, for the reasons already given, I am of opinion there was no evidence that could properly be left to the jury to find such new or fresh contract, and to which of such new contracts could it be said the corroborative evidence applied?

I do not deal with the contention of Mr. MacKelcan that the defendant was exonerated from his promise, as I think that question was left to the jury, and there was evidence on which they might have found, but were not bound to find in favor of the defendant. See *Davis v. Bomford*, 6 H. & N., 245, 254.

I refer as to the nature of the action, and the rules applicable to it, to *Hall v. Wright*, E. B. & E. 746,

which is an interesting case from the divergence of opinion among the Judges in the Court below and in the Exchequer, rather than from any direct bearing it has upon this case.

On the whole, I am therefore of opinion the verdict for the plaintiff should be set aside, and judgment entered for defendant, dismissing the plaintiff's action, with costs.

I have not yet referred to the affidavits on which the rule was moved. They shew no ground for disturbing the verdict if the plaintiff was otherwise entitled to hold it.

GALT, J.—Without expressing any dissent from the judgment of the Chief Justice on the subject of the Statute of Limitations, I think this rule should be made absolute, on the ground that there is no corroborative evidence to sustain the plaintiff's case.

According to her statement the promise was made in 1873. She was then living with her brother, who was well known to the defendant, and there was no reason suggested why, if the defendant had engaged to marry the plaintiff, he should not have declared his intention to the members of her family. So far as I can gather from the evidence his circumstances, in comparison with her's, were such that no opposition was likely to be made by them. No member of the family was examined, and the only evidence of corroboration was that of a witness of the name of Arnold, who stated as follows: "How long have you known Mr. Hunter? I do not know; about thirty years I suppose. You lived near him for a while? Yes, I lived on his farm. Do you remember having a conversation with him on one occasion? Yes, it was three years ago last fall; it was just at the northeast corner of his barn. It was concerning some young women who were passing by at the time. He asked me if I took notice of the young women that were running back and forward there. I said, Yes, sir; I could not help but take notice of that. Well, he said, what do you suppose they are after. Well, I said, I suppose they are after you. The answer that he made me

was that they were not after him, but after his brick house ; but he said they were not going to get it, none of them. He said, I am going to take the one that wants me, not the one that wants the house. I said, I suppose that is Ann Costello, and he said, yes. When was this ? Three years ago last fall."

This is really the whole of the corroborative evidence ; for in the other conversation which the witness stated he had with the defendant some time after the name of the plaintiff was not mentioned by the defendant : " What was the talk on this time. He came to my place. Of course I lived in that house of his, and he came down at night, as he very commonly did. I suppose he had not been very well pleased at something during the day, but he said he was going to do one thing out of three. I said, Andy, what is that ? Well, he said, I am either going to rent my place, or sell it, or get married. Then I said, I suppose you and Ann Costello will soon make the match then ? What did he say to that ? I do not think he made me any answer to it."

Upon this evidence I fail to see there was anything stated by the defendant from which it could reasonably be inferred that he admitted or alleged the existence of any engagement between himself and Ann Costello. Her name was not mentioned by him. It was suggested on the first occasion when the witness stated the conversation took place respecting the young woman, to which the defendant simply assented, and also on the second, to which the defendant made no reply.

ROSE, J.—I agree that the Statute of Limitations is a bar to the plaintiff's recovery.

I am not sure that actions for the breach of a promise to marry should ordinarily receive much encouragement.

It may be that in gross cases a recalcitrant lover should be punished for trifling with the affections of the forsaken one, but unless the result of monopolizing the attentions has been to prevent a settlement in life, and the action is

brought to recover a sum, the income of which will serve as a provision in lieu of the income hoped to be derived from the marriage, it is difficult to see any advantage to the plaintiff from such an action.

If the plaintiff be a woman, one would think the chances of marrying would not be increased by the exhibition of herself in Court as rejected or forsaken, subjecting herself to the ridicule attendant upon a cross-examination as to the incidents of the courtship, and by in some sense making herself public property.

It certainly is not in the interest of the public, or the parties, that those who have no affection for each other should be forced into an unwilling marriage, for morality is not served by such a union.

Moreover, it would appear that any woman cannot, on the whole, suffer loss if a man, who does not love her, refuses to marry her. To be released from such an one must be great gain.

If such an action be brought after the defendant has married another, it must not be forgotten that in many cases much pain must be given to possibly a quite innocent party by the public discussion of a previous love affair.

I am, therefore, of the opinion that the Statute of Limitations should apply to such promises when they have become so stale that the limit of time has been passed.

If six years elapsed after breach without any action being taken to compel some settlement of the doubt which must have arisen, it would seem as if no sufficient reason could be found for encouraging an action after such limited time.

As my brother Galt differs from the opinion of the learned Chief Justice as to the corroboration, I express no opinion, it being unnecessary to determine the point in view of the opinion I have formed on the question of the statute in which, as I understand, we all agree.

Order nisi absolute.

[QUEEN'S BENCH DIVISION.]

REGINA V. DOYLE.

Canada Temperance Act, 1878, secs. 100, 107, 108, ¶117—31-32 Vic. ch. 31, secs. 57, 62 (D.)—Search warrant, when issuable—Evidence under admissible although irregularly issued—Second offence—Imprisonment.

The defendant was convicted before the Police Magistrate of the town of S., for unlawfully keeping for sale intoxicating liquor, &c., at the said town contrary to the Canada Temperance Act, 1878. The depositions were to that effect, and the evidence shewed that the liquor was found upon the premises of the defendant in the said town.

Held, that the local jurisdiction of the Police Magistrate sufficiently appeared.

Before any complaint or charge was made against the defendant a search warrant was issued and executed, and evidence obtained upon his premises, under which he was convicted.

Held, that a search warrant under the Act is a proceeding to sustain a charge made for an offence committed against the Act, and not a proceeding taken upon which to found a charge to be made in case liquor is found on the premises.

Held, however, that although the search warrant was illegally issued the evidence obtained under it was admissible against the defendant.

The conviction in the case was for a second offence and imposed imprisonment in default of payment of the fine and no distress.

Held, that secs. 57 and 62 of the Summary Convictions Act, which form a part of the Canada Temperance Act, authorized imprisonment not exceeding three months in default of sufficient distress.

Quære, whether for a third offence under the Canada Temperance Act a fine of \$100 cannot also be imposed in addition to imprisonment.

H. J. Scott, Q.C., moved to quash the conviction in this case for a violation of "The Canada Temperance Act, 1878," on the following grounds :

1. That the magistrate improperly admitted evidence obtained under a search warrant which was issued illegally before any information was laid, or any prosecution was pending.

2. There was no evidence to shew the offence was committed in the County of Norfolk within the jurisdiction of the magistrate.

3. Neither the information nor the conviction negatived the fact that the defendant sold liquor under a license.

4. The conviction did not shew the previous conviction alleged against the defendant was for an offence committed

in the County of Norfolk, or one over which the convicting magistrate had jurisdiction.

5. The conviction improperly awarded imprisonment in default of distress, there being no authority for the imposition of such imprisonment.

6. There was no evidence upon which to found the conviction.

7. The Canada Temperance Act 1878 was void, as *ultra vires* the Parliament of Canada.

On the 17th of September, 1886, *Scott*, Q.C., supported the motion. The evidence does not shew the offence was committed in the County of Norfolk, nor does it shew the act for which the defendant was first convicted was committed within the said county. The chief objections are :

1. That the prosecution for the second offence is founded wholly upon the evidence discovered by means of the search warrant, and that such warrant was and is an illegal proceeding because it was issued and acted upon before the charge was made against the defendant for a violation, and for the mere purpose of founding a charge against him in case intoxicating liquor was found upon his premises; and section 108 of the Act shews that a search warrant can be issued only when a charge has been made and is pending against a person for a violation of the Act.

5. That the conviction for the present or second offence imposes imprisonment for one month, unless the fine of \$100, and the costs \$9.35, and the charge for conveying the defendant to gaol, be sooner paid, such imprisonment being imposed "in default of sufficient distress" to levy the said moneys out of the goods and chattels of the defendant; while section 100 of the Act awards as punishment for violation of the said Act, as follows: "a penalty of not less than \$50 for the first offence, and not less than \$100 for the second offence, and to be imprisoned for a term not exceeding two months for the third, and every subsequent offence." Section 107 of the Act does not permit imprisonment to be directed merely because that

section authorizes all the provisions of the 31 & 32 Vic. ch. 31, (D.) to be applicable to a prosecution of this kind in the same manner as if such provisions were incorporated in the Temperance Act.

Aylesworth, contra. The conviction is not objectionable upon the ground stated, that it does not appear the convicting magistrate had jurisdiction to convict either for the first or for the second offence.

As to the objection that the search warrant could not be lawfully issued before the charge for a violation of the Act had been made, and was pending before the Magistrate, and that therefore the evidence obtained under it could not be used against the defendant because it had been, as it is said, wrongfully and illegally obtained, that can be no reason why the evidence so obtained should not be used against the defendant. It could not be excluded if some one had forcibly entered the defendant's premises to make the search, and he had found intoxicating liquor upon the premises; and if the evidence could be received in such a case, it should be received in a case of this kind, even if the warrant were not lawfully issued. As to the award of imprisonment for the second offence, the case of *Ex parte Pourier*, 23 N. B., S. C. R. 544, is a decision that section 107 of the Temperance Act makes all the provisions of the 31 and 32 Vic. ch. 31, (D.) a part of the Temperance Act, and by the former Act it is enacted by sections 57 and 62 that where a conviction adjudges a pecuniary penalty or compensation to be paid, and by the Act authorizing the conviction the penalty or compensation is to be levied upon the goods and chattels of the defendant by the distress and sale thereof, and also in cases where, by the Act or law in that behalf, no mode of raising or levying the penalty or compensation, or of raising the same is provided, "a warrant of distress [N. 1-2] may be issued for the purpose of levying the same," and the forms in the schedule of the Act N. 1-2 shew that imprisonment may also be awarded in such cases at the time the defendant is convicted.

Therefore the Police Magistrate had power in this case to award imprisonment.

Scott, in reply. The case cited is not a binding decision, and it does not seem to be warranted by the Temperance Act in the section referred to.

And as to the objection of obtaining and using the evidence by means of the search warrant, the difference between the case put, of some one by an act of trespass obtaining a knowledge of there being liquor kept upon the defendant's premises, and obtaining it, as was the case here, by means of a search warrant, is, that the process of the law has been abused by the issue of the warrant, and the law will not allow a wrongful act of that kind to be used to the prejudice of the defendant.

September 21, 1886. WILSON, C. J.—The conviction shewed the defendant, at the town of Simcoe, did unlawfully keep for sale intoxicating liquor, &c.

The depositions recite the information just as above stated, and the evidence shews the liquor was found upon the premises of the defendant. I think the local jurisdiction of the police magistrate sufficiently appears; and the 117th section of the Act, if necessary, may be invoked as against an objection of this kind, if it can be said to be an objection.

As to the issuing of the search warrant before a complaint or charge was made against the defendant for a violation of the Act, it was argued for the defendant that section 108 of the Act did not authorize such a proceeding, unless a charge was pending at the time for an offence committed against the Act.

That section enacts that, in case a credible witness proves upon oath before the police magistrate, &c., *before whom any prosecution for an offence against the provisions of the Act is brought*, that there is reasonable cause to suspect that any intoxicating liquor, in respect to which such offence has been committed, is in any dwelling house, &c., such police magistrate, &c., may grant a warrant to search

such dwelling house, &c., for such intoxicating liquor, and if the same or any part thereof be there found, to bring the same before him; and any information to obtain a warrant may be in the form of schedule M. to the Act, and the search warrant may be in the form of schedule N.

The information for the search warrant, according to the schedule, form M., is to the effect that the informant "saith that he hath just and reasonable cause to suspect, and doth suspect that intoxicating liquor, in respect to which an offence against the second part of the Canada Temperance Act 1878 hath been committed, is concealed in the [dwelling house, &c.] of P. Q., of—— [here add the causes of suspicion and the particulars of the offence whatever they may be.]

Wherefore, he prays that a search warrant," &c.

And the search warrant, according to the schedule, form N., is:

"Whereas," &c., reciting the information.

"These are, therefore, in the name, &c., to authorize and require you, &c., to enter in the day time into the said [dwelling house, &c.] of the said P. Q., and there diligently search for the said intoxicating liquor, and if the same, or any part thereof, shall be found upon such search, that you bring the intoxicating liquor so found or—gallons thereof, if there be more than twenty gallons so found, and also all barrels, &c., and other receptacles of any kind whatever containing the same, before me, to be disposed of and dealt with according to law."

Then section 109 enacts that when any person is convicted of any offence against the Act the Police Magistrate &c., before whom such person is convicted, "may adjudge and order, in addition to any other penalty or punishment, that the intoxicating liquor, in respect of which the offence was committed, and which has been brought before him in virtue of a search warrant [whether the same be or be not the property of such person], or not more than twenty gallons thereof, if there be more of it than twenty gallons be forfeited, &c., &c."

By section 107 it appears there should be "a prosecution for an offence against the Act brought at the time when the credible witness proves on oath" such facts as before stated, which are required to authorize the issuing of a search warrant.

The warrant then issues, and if any such liquor is found, it, with the barrels, &c., is to be brought before the magistrate who has issued the warrant, that the same may "be disposed of and dealt with according to law."

And the way it is to be dealt with is by section 109 stated to be that the police magistrate, &c., before whom the party is convicted, may adjudge and order, in addition to any other penalty or punishment, "that the intoxicating liquor in respect to which the offence was committed, and which was brought before him in virtue of a search warrant as aforesaid, or not more than twenty gallons thereof, if there be more than twenty gallons, be forfeited."

The search warrant under this statute is a proceeding in aid, and not an original proceeding under the Act.

It is a proceeding to sustain a charge or a complaint made for an offence committed against the Act, and not a proceeding taken upon which to found a charge to be made in case liquor is found on the premises.

If it were so the house of any one could be invaded and ransacked to find out if by chance he could be prosecuted as an offender.

A search warrant which is granted in the case of stolen goods is founded upon a complaint under oath that the complainant has reason to suspect or believe that certain goods have been stolen, and that such goods are suspected to be in the house, or upon the premises of such a person, and that they are concealed there, and that the complainant suspects so for certain causes which he must set out in the complaint: *Elsee v. Smith*, 1 D. & R. 97, 2 Ch. 304. That warrant is not only for the discovery of felons and the obtaining of evidence against them, but also for "the helping of persons robbed to their goods:" 2 Hale P. C. 149.

In the case in question it may be said the search warrant was for the discovery of offenders who unlawfully keep intoxicating liquors for sale contrary to the statute, and for the obtaining of evidence against them, and that it may therefore be properly issued under section 108 of the Act which enables it to be granted.

But the offence of unlawfully keeping intoxicating liquor for sale contrary to the Act is not a felony, and it does not help any person to his property as in the case of stolen goods. There is not, therefore, a similarity between the warrants which are granted in these two cases.

The statute, too, applies, I think, from its language, to the case of a prosecution under the Act being actually pending when and in the course of which the warrant issues to make the search.

The warrant was therefore illegally issued, and the evidence obtained under it was obtained by the unauthorized execution of an illegal process.

The question then is, was the evidence so obtained admissible on the prosecution which was afterwards instituted against the defendant, and upon which he was convicted?

Does the fact of the evidence having been obtained under colour of legal process, and strictly speaking by an abuse of legal process, make any difference as to its admissibility, whether it was so obtained, or whether it had been obtained by force and violence, or by fraud?

I think the evidence is admissible so long as the fact so wrongly discovered is as a fact—apart from the manner in which it was discovered—admissible against the party.

If a prisoner make a confession of guilt of the larceny charged against him by means of threats or promises of favour or advantage made or held out to him by any one having authority over him, and say where the property stolen will be found, and from the information so improperly obtained the property is found at the place named, the fact that the property was so found upon the information of the prisoner is admissible against him although

that information was wrongly obtained. The confession itself cannot however be used against him, because of the manner in which it was procured. The reason the confession in such a case is not admissible is, that in law it cannot be depended upon as true, for one in such a case may say, and and is likely to say, that which is not the truth, if he thinks it will be to his advantage to do so.

And the note in 1 Leach 264, is instructive on that point: "Three men were tried and convicted for the murder of one Harrison. One of them, under a promise of pardon, confessed himself guilty of the fact. The confession was not therefore given in evidence against him, and a few years afterwards it appeared that Harrison was alive." It is not said whether they were hanged or not before Harrison was found to be still living.

If the property be found at the place stated by the prisoner, that is a *fact* which must be true, and although the discovery was made by undue means, the statement which was made by the prisoner is shewn not to have been a fabricated statement made by him in consequence of such undue means: *Rex v. Warickshall*, 1 Leach 263, and note 265; *Taylor* on Evidence, sec. 824, of the earlier editions.

But although the fact of the prisoner telling where the stolen property will be found, or the giving of it up will be admissible in evidence against him, his confession made at the time will not, if improperly procured, be receivable against him; as in *Rex v. Jones*, R. & R. 152, where the prosecutor said to the prisoner "he only wanted his money, and if the prisoner gave him that he might go to the devil if he pleased, upon which the prisoner took 11s. 6½d. out of his pocket and said it was *all he had left of it*: it was held the confessional part of the statement ought not to have been received."

If the property is not found as stated by the prisoner upon information improperly obtained from him, the whole matters connected with the confession are to be excluded, because that which the prisoner has said as to

the discovery of the property "has not been confirmed by the finding of the property:" *Rex v. Jenkins*, R. & R. 492.

If property is found upon such a confession, it is only "so much of the confession as relates *distinctly* to the fact discovered by it which may be given in evidence, as this part at least of the statement cannot have been false:" *Taylor on Evidence*, sec. 824; 1 Leach C. C. 265, note (a.)

The fact therefore that the evidence has been improperly procured is not a reason for rejecting such evidence. It follows that if one who has had his watch stolen suspected a particular person of the theft, and the owner of the watch knocked the other down and searched him and found the watch upon him, the fact that such other person had the watch upon him would be evidence against him, although the evidence had been obtained in rather an irregular way.

The knocking down might be prosecuted either civilly or criminally as a battery, but the evidence which was procured by means of it would be good evidence.

So if the prosecutor in this case had forcibly entered the house of the defendant and obtained the knowledge of liquor being unlawfully kept there by him, the evidence so obtained would be receivable against him, but the prosecutor would be punishable for his wrongful entry upon the premises.

It is sufficient to say the evidence in this case was rightly received, although it was irregularly obtained.

The last objection is, that imprisonment has been imposed in addition to the fine for the second offence, while by the Act imprisonment, it is said, can be adjudged only in the case of a third offence.

Under section 100 the offenders against the Act are to be liable to the following penalties; that is, to a penalty of "not less than \$50 for the first offence, and not less than \$100 for the second offence, *and* to be imprisoned for a term not exceeding two months for the third and for every subsequent offence."

I do not feel quite sure the punishment for the third

offence is only imprisonment for not more than two months. The section reads as if the third offence was to be punished by the penalty of not less than \$100, as well as the imprisonment, from the way in which the sentences for the second and third offences are coupled together. The language, to repeat it, is, the penalty shall be "not less than \$100 for the second offence, *and* to be imprisoned for a term not exceeding two months for the third and for every subsequent offence."

If the imprisonment for the third offence for a term not exceeding two months, which would be an unconditional sentence, is a greater punishment than the payment of \$100 for the second offence, then the imprisonment is the full penalty for the third offence; but, as the imprisonment may be for a week, or for only twenty-four hours, for the third offence, while it cannot be less than \$100 for the second offence, the Legislature may for the third offence have intended to add to the imprisonment the \$100; for the words "not less than \$100 for the second offence, *and* to be imprisoned for a term not exceeding two months for the third and for every subsequent offence," are by no means quite plain or clear to the contrary.

But I do not read section 100 of the Temperance Act as adding to the imprisonment for the third or subsequent offence the pecuniary penalty of \$100 specified as the penalty for the second offence. But I say so with some doubt, and that point has not been presented yet for judgment.

The question before me is only as respects the second offence, and as it is clear there is no mode of raising or levying that penalty provided in the Temperance Act, the enactment in section 107 of that Act must therefore be given effect to which makes sections 57 and 62 of the Summary Convictions Act a part of the Temperance Act. And by these sections the Police Magistrate was authorized to issue a distress warrant against the defendant's goods, and in case goods not being found, to issue a warrant of commitment for any period not exceeding three months.

The case of *Ex parte Pourier*, 23 N. B., S. C. R. 544, is expressly in point.

This singular state of things may therefore happen—that, as the offender against the Temperance Act for the third or any greater number of times is to suffer not more than two months imprisonment, and the offender for the first and second offences is to pay a pecuniary penalty of \$50 or \$100, and if he do not pay, or if he do not pay the whole of the penalty and costs, he may be imprisoned for three months, although he may have paid nine-tenths of the whole of the conviction moneys ; so that the punishment for the first and second offences may be much greater than for the third, or, it may be, for the tenth offence, and, therefore, the more aggravated offence ; but with that I have nothing to do.

The motion will be dismissed, with costs.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

REGINA V. BRADY.

Canada Temperance Act, 1878—Presumption from the finding of appliances mentioned in sec. 119—Variance between conviction and minute of adjudication—Power of amendment—Certiorari—Power of Court to dispose of the case on the merits on return of, under secs. 117, 118.

The defendant was charged with the offence of keeping liquor for sale contrary to the provisions of the second part of the Canada Temperance Act. Evidence was given of the finding of certain of the appliances mentioned in sec. 119.

Held, that apart from the presumption created by that section upon the finding of such appliances, such finding was evidence of a keeping for sale, of the weight of which the magistrate was the proper judge.

The magistrate at the close of the case made a minute of adjudication, in which he stated that he found the defendant guilty and imposed a fine of fifty dollars and costs, to be paid by a date named, and awarded imprisonment for thirty days in default of payment. Afterwards when drawing up the formal conviction, the magistrate adopted the form I₁, in the schedule to the Summary Convictions Act, directing that in default of payment by the day named, the penalty should be levied by distress and sale, and awarding imprisonment for thirty days in default of sufficient distress.

Held, (1) that the conviction in the form I₁, was the proper conviction to be made, under the combined provisions of sections 107 of the Canada Temperance Act, and sections 42 and 57 of the Summary Convictions Act, and not the form I₂, to which form the minute of adjudication apparently pointed. (2) That the conviction was open to the objection that it did not correspond to the minute of the actual adjudication, and, therefore, could not be supported for want of jurisdiction in the magistrate to make it. (3) That under sections 117 and 118 Canada Temperance Act the Court, upon the motion to quash, might dispose of the case upon the merits upon the material returned with the certiorari, and that in this case the conviction, being warranted by the evidence, ought to be affirmed and the minute of adjudication amended so as to conform to it.

Aylesworth moved to quash the conviction in this case on the following grounds :

1. That the conviction adjudged the defendant, in default of payment of the fine imposed, and of sufficient distress, to be imprisoned in the common gaol, whereas the Police Magistrate had no jurisdiction under the Canada Temperance Act to adjudge imprisonment.

2. The punishment adjudged by the conviction against the defendant was not the sentence in truth pronounced by the Police Magistrate in Court upon his convicting the defendant, and it was therefore a punishment there was no jurisdiction to impose; that the Police Magistrate, in fact,

adjudged the defendant to pay a fine of \$50, and in default of payment to be imprisoned, and the conviction did not in this respect follow the actual adjudication of punishment.

3. The police magistrate had no jurisdiction to make the conviction, which proceeded wholly upon the presumption of guilt, supposed to be raised under section 119 of the Canada Temperance Act, 1878, because such presumption under the section arose only when the appliances of a bar and intoxicating liquor were found in houses in municipalities in which a prohibitory by-law passed under the provisions of the Canada Temperance Act 1878 was in force, and there was no such by-law in the municipality in which the defendant's premises were situate.

The presumption under that section only arose in cases in which the appliances of a bar and intoxicating liquor were found in the same room or place.

There was no intoxicating liquor or mixed liquor capable of being used as a beverage found in the room in which in this case there were said to have been found the usual appliances of a bar.

The case was argued on the 8th of October, *Aylesworth* supporting the motion, and *Shepley* shewing cause against the same.

October 12, 1886.—WILSON, C. J.—I overruled all the objections but the one numbered 2, which remained over for consideration.

I had in a former case held that imprisonment could be imposed for a first offence against the Act, and I was of opinion that whether section 119 of the Temperance Act applied or not to the case, that the fact of a bar and intoxicating liquors being there found, and the usual appliances for the sale of such liquors, was some evidence, independently of that section of the Act, from and upon which the magistrate could act in forming his opinion of the truth of the charge that the defendant did keep intoxicating liquor for sale.

I was also of opinion that the liquor spoken of by a witness as whiskey in which some herbs were found, was a fact upon which the Magistrate had to find, and that I had no right to control his opinion on a mere matter of fact. There was in truth a pump in the bar connected with a barrel of blue ribbon beer in the cellar. There was every indication of the defendant keeping intoxicating liquors for sale, and that also was a fact to be determined by the Magistrate.

I need not refer to the numerous cases which shew that the decision of the Magistrate upon a matter of fact is final, and will not be reviewed.

The last one I have seen is *Regina v. Sheil*, 50 L. T., N. S. 599, in which the Justice's decision that street or no street being a question of fact and not of law, would not be reviewed. I did not consider anything else in the case of any consequence excepting the second exception before referred to. That objection is that the conviction does not state the judgment which was, in fact, pronounced.

The minutes of the proceedings before the Police Magistrate state the judgment as follows :

"June 4th, 1886. Court opened at 10 o'clock a. m., when judgment was given as follows :

"I adjudge the said Nicholas Brady guilty of keeping intoxicating liquor contrary to the provisions of the second part of the Canada Temperance Act 1878, now in force in the county of Oxford, on the 21st of May, 1886, and that for such offence he shall pay a fine of fifty dollars and all costs in the case, on or before the tenth day of June next, or in default, he be imprisoned in the common jail of the county of Oxford for thirty days, if not sooner paid.

"H. PARKER, P. M.

The costs are then made up at \$8.65. The conviction returned shews the adjudication as follows :

"I adjudge the said Nicholas Brady, for his said offence, to forfeit and pay the sum of fifty dollars, to be paid and applied according to law, and also to pay to the said G. H. Cook (the informant) the sum of eight dollars and sixty-

five cents, for his costs in this behalf, and if the said several sums be not paid on or before the tenth day of June, in the year of our Lord 1886, then I order the said sums to be levied by distress and sale of the goods and chattels of the said Nicholas Brady, and in default of sufficient chattels in that behalf I adjudge the said Nicholas Brady to be imprisoned in the common jail for the county of Oxford, and there to be kept for the space of thirty days, unless the said sums and all costs and charges of the said distress be sooner paid."

The question is, whether the addition to the conviction of the distress by levy on the defendant's goods to be issued before imprisonment, upon default made in payment of the fine and costs, invalidates the conviction.

The Temperance Act provides no means of enforcing payment of the penalty for the first offence, which this is, against the Act. The proceedings are therefore by section 107 of that Act taken under the Summary Convictions Act.

By section 42 of that Act the magistrate had power apparently to award either that the penalty should be levied by distress of the goods of the defendant, and if the distress were insufficient to award imprisonment, or to award imprisonment only, for the forms in the schedule I1 and I2 referred to in that schedule are drawn in that way.

But that section must be read in connection with section 57 of the same Act, and that section enacts that when a pecuniary penalty is imposed, "and by the Act or law authorizing such conviction, the penalty is to be levied upon the goods and chattels of the defendant by distress and sale thereof, and also in cases where, by the Act or law in that behalf, no mode of raising or levying the penalty is stated or provided, the justices or any one of the justices making such conviction * * may issue his warrant of distress for the purpose of levying the same."

And the form in the schedule referred to is N1, and by that form the penalty to be adjudged is, that it be levied

on the goods of the defendant, and in default of sufficient distress that the defendant be imprisoned; so that under section 107 of the Temperance Act the remedy for the penalty is by distress of the goods of the defendant, and if that be insufficient then by his imprisonment.

The minute of adjudication required to be drawn up by section 42 of the Summary Jurisdiction Act is in order that the adjudication and the conviction should correspond.

When a conviction was drawn up by justices stating it to be founded upon the information of B. and C., in place of A., the real informer, B. and C. having been witnesses only, that conviction being drawn up on the back of the paper which contained the information of A., and a copy of that incorrect conviction was delivered to the defendant, the Sessions, on appeal, although the justices had returned a regular conviction, quashed the regular conviction because it was at variance with the minutes of the conviction delivered to the party convicted. The Court of Queen's Bench quashed the order of Sessions, considering the variance arose from mere mistake, and the party was not surprised by it: *Rex v. Allen*, 15 East 333.

In *Massey v. Johnson*, 12 East 67, the Court treated the name of the person who was stated to be the informer as surplusage in the warrant of commitment, such person not being the informer in fact, and the warrant then agreed with the conviction.

In *Leary v. Patrick*, 15 Q. B. 266, the conviction was drawn up and made no mention of costs. The warrant of distress was to levy the penalty and twelve shillings for costs. The sessions quashed the conviction. Held, that as costs had not been adjudicated against the party, he was entitled to recover in his action, because the warrant was illegal in directing costs to be levied, when in fact costs had not been awarded.

The conviction then, varying from the actual adjudication, and directing distress upon the goods of the defendant in case of non-payment of the penalty, and then imprisonment in case of an insufficiency of the distress

while the adjudication was imprisonment only in case of non-payment of the penalty, cannot, I think, be supported, unless the adjudication can be amended under the special provisions of the Temperance Act, which I will refer to.

I have no doubt the magistrate could himself have amended the adjudication; but that should have been done in the presence of the defendant, which would have been in effect the real, because the substituted, judgment. Such a course is taken if from any cause at the Assizes a change is made in the sentence, by bringing up the prisoner and pronouncing the new judgment.

The question then is, can this conviction be supported or amended under the Temperance Act of 1878? Can this case be moved here by *certiorari*?

Section 111 of the Canada Temperance Act, 1878, says: "No conviction, judgment, or order, in any such case shall be removed by *certiorari*, or otherwise, into any of Her Majesty's Superior Courts of record, nor shall any appeal be allowed, &c., where the conviction has been made by a
* * Police Magistrate * *"

That will not prevent the Crown from removing it by *certiorari*, as the Crown is not expressly named.

Nor will it prevent the removal by any of the parties if the magistrate had no jurisdiction, for the superior Courts have always authority to control the inferior Courts, and restrain them within their proper limits.

Is the question of jurisdiction raised in this case?

The objection is that the magistrate adjudged imprisonment only, if the penalty were not paid; whereas by the conviction he has awarded distress against the goods in case the penalty be not paid, and then imprisonment in case the distress proves to be insufficient.

The magistrate had jurisdiction over the person, and over the offence, and within the locality, and jurisdiction also to adjudge imprisonment; but then that imprisonment was not for the non-payment of the penalty, but for the insufficiency of the distress.

What then is the nature of that defect in the proceedings?

Is it one that affects the jurisdiction of the magistrate?

He did not give judgment, in fact, as he has said he did by his conviction.

I thought at first that might be held to be a mere irregularity, mistake or error, in the execution of the powers of the magistrate, and not an act affecting his jurisdiction, but I am more inclined to think it was an act or defect of jurisdiction. The case does not properly come within section 111, for there is no power of amendment given by it.

I have therefore next to consider section 117. By that section it is declared that "no conviction or warrant enforcing the same, or other process or proceeding under either of the said Acts, shall be held insufficient or invalid * * by reason of any other defect in form or substance provided it can be understood from such conviction, warrant, process or proceeding, that the same was made for an offence against some provision of such Act within the jurisdiction of the justice, or magistrate, or other officer who made or signed the same, and provided there is evidence to prove such offence, and no greater penalty is imposed than is authorized by such Act."

Now in this case, the offence is (1) one against a provision of the Act, and (2) it is an offence which is within the jurisdiction of the convicting magistrate, and (3) there is evidence to prove the offence, and (4) no greater penalty is imposed *than is authorized by the Act*. Why then should it be held to be insufficient or invalid?

I cannot say in the face of that enactment (if the *certiorari* was properly grantable) that the conviction or warrant enforcing the same is insufficient or invalid.

It is an all-healing protective enactment against all defects in form or substance, provided these four requirements are complied with or fulfilled; but it is precisely what was meant, and it is expressly what the legislature intended to be, and has declared to be the law.

Then section 118 enacts that "upon any application to quash such conviction, or warrant enforcing the same, or other

process or proceeding, or to discharge any person in custody under such warrant, whether such application is made in appeal, or upon *habeas corpus*, or by way of *certiorari*, or otherwise, the Court or Judge * * * shall dispose of such appeal or application upon the merits, notwithstanding any such variance or defect as aforesaid, and such Court or Judge may in any case amend the same, if necessary; and in all cases where it appears the merits have been tried, and that the conviction, warrant, process or proceeding is sufficient and valid under this section or otherwise, such conviction, &c., shall be affirmed, or shall not be quashed (as the case may be) and every conviction, &c., so affirmed, or affirmed and amended, may be enforced in the same manner as convictions affirmed on appeal, and the costs thereof shall be recoverable as if originally awarded.’

In this case then, although the adjudication, conviction and warrant would have been but for these enactments invalid, I am required to dispose of the application made to quash, &c., upon the merits; that is, upon the matter charged being an offence within the Act, and the evidence to prove it; and I am to determine whether the offence was within the jurisdiction of the magistrate, and whether any greater penalty has been imposed than is authorized by the Act, according to section 117; and these merits I am to determine, notwithstanding any such variance or defect in form or substance. And besides such disposition upon the merits, I am to amend the conviction, &c., if necessary; and if the merits have been tried, and the conviction, &c., is sufficient and valid under this section, or otherwise, (it is not said sufficient and valid in law, but *under this section, or otherwise*,) I am to affirm it, or I shall not quash it.

The Legislature knew there would be difficulty in enforcing the law, and it knew that much of the difficulty would be experienced in maintaining the validity of the convictions and warrants made under it if they were reviewed and construed according to the strict rules of law, and it

was purposely to meet this latter difficulty that the provisions just referred to were enacted, the general effect of them being that if an offence against the Act be proved and the magistrate had jurisdiction to deal with it, and he convicted, his decision shall not be impeached, if no greater penalty than was authorized by the Act has been imposed, unless upon the merits.

I do not see how I can give effect to this motion in the face of these enactments.

Upon the merits, the defendant was rightly convicted by the Police Magistrate according to the proceedings and evidence returned to the Court.

Under these provisions I am to dispose of this case upon the merits. In what manner, however, am I to do so?

Does the Act mean that I am to try the case upon the material returned before me? Or that I am to try the case upon the merits as would be done on an appeal to the General Sessions? If it means the latter, I have not so tried the case.

I think it means that the Court or Judge is to dispose of it. That is what the Act says. It does not say *try* it; and it is to be so disposed of whether the case is brought by way of appeal, *habeas corpus*, *certiorari*, or otherwise. Now on *habeas corpus* or *certiorari* the case is not disposed of as it is on an appeal. I think, therefore, I may dispose of the case upon the merits, by trying and adjudicating it upon the proceedings returned before me; and upon such proceedings I find the defendant is guilty of the offence charged against him, and that he was rightly convicted of the same, and I affirm that finding; and I amend the minutes or memorandum made by the magistrate of the conviction, by striking out that part of it which directs the defendant to be imprisoned if he make default in payment of the said sums he was adjudged to pay, and by inserting therein that if default be made by the defendant in payment of the said sums, that the same, or any part thereof, remaining unpaid, shall be levied by distress and sale of the goods and chattels.

of the defendant; and if the distress be insufficient, or if no distress be found, then that the defendant be imprisoned for the time, and in the place and manner in the said note or memorandum, and in the said conviction mentioned.

And I dismiss the application, without costs.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

REGINA V. HODGINS.

Canada Temperance Act, 1878, secs. 100, 115, 120, 121—Disqualification of convicting magistrate—R.S.O. ch. 71, secs. 7, 22—Variance between information and conviction—"Disposal"—"Sale"—Amendment.

The Court refused to quash a conviction under the Canada Temperance Act, 1878, on the ground that one of the convicting magistrates had not the necessary property qualification, the defendant not having negatived the magistrate's being a person within the terms of the exception or proviso of sec. 7 of ch. 71, R. S. O.

Held, also, that there was no variance between the information and conviction because the former used the expression "disposal," and the latter "sale," and that if there had been, an amendment of the information would have been made under secs. 116, 117, 118 of the Canada Temperance Act, 1878.

October 23rd, 1886. *Clement* moved to quash the conviction in this case under the Canada Temperance Act, 1878

The information stated that the defendant did on the 13th of June, 1885, "unlawfully dispose of intoxicating liquor." It was laid before Joseph Barker and A. Campbell, justices of the peace, on the 24th of June, 1885.

The conviction was made on the 25th of June, 1885, by the same two justices, and by it the defendant was found guilty for that he did unlawfully sell intoxicating liquor.

The conviction was moved against because of the variance between the information and conviction, the information charging the offence to have been a disposal, and the conviction a sale; and that A. Campbell, one of

the justices who convicted, was disqualified because he had not the necessary property qualification to entitle him to act as a justice of the peace.

He contended that the amending section of the Act did not apply, because the information though varying from the conviction did not state an offence against the Act, and it was only when an offence was stated that an amendment could be made by changing it to any other offence, if the evidence sustained that other offence.

As to the disqualification, he argued that the R. S. O. ch. 71, sec. 7, enacts that no person shall be a Justice of the Peace or act as such, who has not &c., [property of a certain kind and value], and that it rested upon Campbell to prove he was qualified.

Maclaren, contra. The term "dispose" in the information is not objectionable, for sections 115 and 120 use that word.

The word "dispose" was considered in *Oliver* q. t. v. *Hyman*, 30 U. C. R. 517. If there is a variance an amendment may be made under the Act. As to the disqualification, it does not necessarily avoid the acts of the Justice. The case of *The Margate Pier Co. v. Hannam*, 3 B. & A. 266, is expressly in point. See also *Rex v. The Justices of Herefordshire*, 1 Chitty 700; *Regina v. Richmond*, 8 Cox C. C. 314. The defendant should have shewn he did not know of the disqualification at the time: *Regina v. Justices of Kent*, 44 J. P. 298. That case is to be found in 4 Fisher's Dig. 1091.

October 26th, 1886. WILSON, C. J.—The Imperial Act, 18 Geo. II ch. 20, enacts, section 1, that no person shall be capable of being a justice of the peace, or of acting as such, who shall not have the stated property qualification, and who shall not take the oath of office; and by section 3, any person who shall act as a justice of the peace without having taken the oath, or without having the required property qualification, shall forfeit £100. The exceptions are contained in secs. 12, 13, 14, 15.

In our Act, R. S. O. ch. 71, sec. 4, the enactment is: "Except where otherwise specially provided, all Justices of the Peace appointed shall be of the most sufficient persons dwelling in the counties, &c., for which they are appointed."

Sec. 5. "Except where otherwise specially provided by law no attorney, &c., shall be a justice of the peace during the time he continues to practice as an attorney, &c."

Sec. 7. "Except where otherwise provided by law no person shall be a justice of the peace or act as such who has not " &c., [the required property qualification.]

Sec. 12. "When not otherwise provided, any person who acts as justice of the peace" [without taking the oath or without having the property qualification,] "shall for every offence forfeit \$100 * * and in every such action, &c., the proof of his qualification shall be upon the person against whom the suit is brought."

Sec. 22. "Nothing in this act contained shall extend to the members of Her Majesty's Executive council * * or to any mayor, alderman, reeve, or deputy-reeve of any municipality."

In proceeding under the 12th section for the penalty it would be necessary to aver the defendant was not a mayor, &c.; for the exception as to mayors, &c., is contained in the 5th and 7th enacting clauses, and therefore it would be necessary to negative that the defendant was within the excepted cases in these sections. But by reason of the special enactment in section 12 it would not be necessary for the prosecutor to give proof of the *qualification* of the defendant. The *qualification* referred to throughout the Act in the taking of the oath of possessing the necessary property qualification, and the possession of that property. The *qualification* is quite distinct from the person being *qualified* by reason of his being one of the class of persons named in the 22nd section of the Act. This, too, is a mere collateral proceeding, in which in my opinion everything should have been shewn to prove a complete case.

In the present case the defendant has not negatived Mr. Campbell being a person who is within the terms of the exception or proviso of the 7th section; so that he may be the mayor of the town, or perhaps reeve, or deputy reeve of some other municipality; and in that case he is under the protection of the 22 sec. of this Act, and also of the Municipal Act, 1883, sec. 416.

The defendant has therefore failed in shewing the justice to be a person who may not lawfully act as a justice, although he has not the required property qualification.

Besides that, it does not follow the acts of the person acting as Justice are void because he has not the property qualification, as the cases referred to shew; and it is important to notice that section 6 of the Act, while prohibiting sheriffs and coroners from acting as justices, declares, besides the penalty, their acts as justices "shall be absolutely void and of no effect."

The other objection is, that the information does not describe an offence against the Act and that it cannot be amended.

Section 100 of the Canada Temperance Act, 1878, enacts that whoever exposes or keeps for sale, sells, or barter, or in consideration of the purchase of any other property gives to any other person any spirituous or other intoxicating liquor, shall be liable to a penalty &c.

Section 115 enacts that in describing offences respecting the sale or other unlawful disposal of such liquors in any information &c., it shall be sufficient to state the unlawful sale, barter, *disposal*, or keeping of the same, without stating the name of the person to whom it was sold, bartered, or *disposed* of and it shall not be necessary to state the quantity sold, bartered, *disposed* of, or kept, except in the case of offences where the quantity is essential, and then it shall be sufficient to allege the sale, or *disposal* of more or less &c.

Section 120 enacts that in proving the sale, or barter, or other unlawful *disposal* of liquor it shall not be necessary

to shew that any money passed &c., if the justices are satisfied that a transaction in the nature of a sale or barter or other unlawful *disposal* actually took place.

Section 121. In any prosecution for the sale, barter, or other unlawful *disposal* of intoxicating liquor it shall not be necessary that any witness should depose to the fact of sale or other *disposal*, &c.

When in the Act *disposed* is used as an equivalent in some parts for all the expressions in section 100 excepting "sale and barter," and in other parts for all the other words excepting the word "sale," and in so many parts of the Act, it is impossible to say that the term *disposed* of in the information does not describe an offence contrary to the provisions of the Act, and more particularly when the Act declares that the "sale" or other *disposal* will sufficiently appear when it appears that the evidence establishes an infraction of the law complained of.

The word *dispose* can be applied in many ways.

A person may *dispose* of his property or business by gift, exchange or sale; a person may have a *disposing* mind, as in making his will, meaning that he is conscious of the act he is doing; a person may *dispose* his grounds or books according to a certain plan or order; and a person may be not *disposed* to do a particular act, meaning that he is not inclined to do it. I have no idea that "dispose of in any manner whatsoever," is confined to a sale, when the whole tenor and purport of the statute points to a different construction. If there was any necessity for amending the information, I should certainly do so under sec. 116, 117 & 118 of the Act.

I dismiss the application, with costs.

Application dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

REGINA v. LYNCH.

Conviction—Certiorari—49 Vic. ch. 49, secs. 2, 3, 5, 7, (D.)—Retrospective operation of Statute—Excess of jurisdiction.

Held, that though not expressly so enacted, 49 Vic. ch. 49, (D.) is retrospective in its operation, and applies to convictions whether made before or after the passing of the Act, and that under sec. 7 the right to certiorari is taken away upon service of notice of appeal to the Sessions, that being the first proceeding on an appeal from the conviction.

Held, also, following *Regina v. Brady*, [ante p. 358,] that where imprisonment is directed on non-payment of a penalty, the award of distress of the goods to levy it, and then imprisonment in case the distress prove insufficient, is invalid in law, and an excess of jurisdiction.

Held, also, that the punishment being in excess of that which might have been lawfully imposed, the defect was not cured by secs. 2 and 3 of the above Act.

October 1, 1886, *T. W. Howard* obtained an order *nisi* to quash the conviction in this case.

The conviction was made on the 15th of January, 1886, for that the defendant had unlawfully in his possession one rifle, the property of Her Majesty, contrary to the form of the statute in such case made and provided, for which the defendant was adjudged to pay \$5 and \$3.60 costs.

October 8, 1886. *Clement*, for the convicting justice and the informant, in shewing cause, contended that the Act 49 Vic. ch. 49, sec. 7, (D.) took away the writ of *certiorari* where the party convicted had appealed to the General Sessions of the Peace, as the defendant in this case, it was said, had done.

Howard, contra, argued that the Act last mentioned was passed on the 2nd of June, 1886, and did not therefore apply to this conviction which was made before the passing of that Act.

October 15th, 1886. WILSON, C. J.—I shall consider the question as to the *certiorari* first, for it will be unnecessary to refer to the objections taken to the con-

viction, if the defendant is concluded from having a *certiorari*.

The 7th section of the Act of 1886 enacts that "No writ of *certiorari* shall be allowed to remove any conviction or order had or made before any justice of the peace, if the defendant has appealed from such conviction or order to any Court to which an appeal from such conviction or order is authorized by law, or shall be allowed to remove any conviction or order made upon such appeal."

Is this enactment retrospective?

The maxim is, "*Nova constitutio futuris formam imponere debet, non preteritis*:" 2 Inst. 292.

The defendant had not, before that Act was passed, any vested right to a *certiorari*. It is not a writ of course, but is grantable only in the discretion of the Court on cause being shewn for it: *Rex v. Eaton*, 2 T. R. 89.

It is a prerogative writ: *Rex v. Plumbe*, Lofft at p. 61.

It is "not to be granted *ex debito justitiæ*, but the application is to the sound discretion of the Court:" *Rex v. Bass*, 5 T. R. 251.

The enactment here is that "no writ of *certiorari* shall be allowed to remove any conviction, &c." That allowance is either the act of the Court, or it may refer to the allowance of it by the justice of the peace under 5 Geo. II. ch. 19, sec. 2, for "the allowance of it is by the person to whom the *certiorari* is directed;" and it is not to be made till after the recognizance has been entered into: *Rex v. The Inhabitants of Abergele*, 5 A. & E. 795.

In *Moon v. Durden*, 2 Ex. 22, it was held that the enactment that "all contracts and agreements by way of gaming or wagering shall be null and void, and that no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, &c.," was prospective only, and not retrospective.

It was contended for the defendant that the Act was retrospective, for it avoided all wagers, and it declared no action should be brought or *maintained* for the recovery of

money won by a wager, and it was argued the latter clause would have no effect if the Act were confined to future wagers only, for the Act had already enacted that the contract should be void. But the Court held that the latter clause was either unnecessary, or it might be read as a provision that no *future* action should be brought, or if brought, should not be *maintained*; much stress having been laid upon that word which it was argued indicated that relation was made by it to actions brought before the passing of the Act, and that such latter clause was not sufficiently clear to alter the general rule that Acts are not to be construed as operating retrospectively. In the judgment of Parke, B., it is said: "But this rule, which is one of construction only, will certainly yield to the intention of the Legislature; and the question in this and in every other similar case is whether that intention has been sufficiently expressed. Upon that question it is that I have felt considerable doubt.

It seems a strange thing to hold that the Legislature could have meant that a party who, under a contract made prior to the Act, had as perfect a title to recover a sum of money as he had to any of his personal property, should be totally deprived of it without compensation. It is still a stranger thing to hold that if he has already commenced an action with an undoubted right to recover his debt and costs, he should not only forfeit both, but also be liable, as he would in the ordinary course of a suit, to pay the costs of his adversary by being obliged to discontinue, or be nonprossed, or have his judgment arrested. These considerations afford a strong reason for limiting the operation of the words of this section, and holding that they apply to future contracts and actions on such future contracts only; at all events, to future actions only, if any distinction can be made in the degrees of apparent injustice."

In *Pardo v. Bingham*, L. R. 4 Ch. 735, the 10th section of the Mercantile Law Amendment Act, 19 and 20 Vic. ch. 97, was held to be retrospective; so that a cause

of action which accrued before the passing of that Act was not entitled to be commenced by suit but within the time fixed by the statute 21 Jac. 1, although the person was beyond the seas when the cause of action accrued. The Lord Chancellor said: "In *Moon v. Durden*, 2 Ex. 23, Baron Parke did not consider it an invariable rule that a statute could not be retrospective unless so expressed in the very terms of the section which had to be construed, and said that the question in each case was whether the Legislature had sufficiently expressed such an intention. In fact we must look to the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state of the law and what it was the legislature contemplated. * * * I think there is a considerable difference between this case and a case where the right of action is actually taken away; that is the ground of the decisions in *Moon v. Durden*, and *Jackson v. Woolley*, 8 E. & B. 778. In each of those cases the person had acquired by positive act *inter partes* a right of action, * * and in the former case the person had actually brought an action before the statute passed."

In *The Queen v. Vine*, L. R. 10 Q. B. 195, an Act which provided that "every person convicted of felony shall for ever be disqualified from selling spirits by retail," &c., was held to be retrospective, although a penalty was imposed on the person who had been so convicted for selling.

I cannot doubt, with the aid of these authorities, that the section in question has a retrospective operation, because it interferes with no absolutely vested right of claim in the party convicted, but with a right which is subject to the discretion of the Court; because, also, it prohibits the Court from exercising that discretionary power, if the allowance mentioned in that section refers to the Court, and to prohibit the justice from allowing it, if the allowance has reference to his act; and there is no reason why the allowance should not be stayed or refused as well

in cases decided before the passing of the Act as in cases decided after its passing; and because the determination of such a question depends not upon any fixed rule, that in no case shall a statute be deemed to operate retrospectively unless it expressly provides that it shall have such operation, but upon the intention of the Legislature, to be collected from the language, scope and purview of the enactment, whether the statute should be construed retrospectively or not. I read this enactment as plainly indicating that after the passing of the Act no *certiorari* shall be allowed for the removal of any conviction, whether that conviction was made before or after the passing of the Act.

The next enquiry is, has the defendant appealed from such conviction? See 32 & 33 Vic., ch. 31, sec. 65 (D); 33 Vic., ch. 27 (D) amending sec. 65, and the Act 40 Vic., ch. 27 (D), amending the same section, and the 49 Vic., ch. 49, sec. 11 (D).

There is something very confusing in these Acts so far as section 65 of ch. 31 of 1869 is concerned.

The 1st sub-section of section 65, enacted by the 33 Vic., ch. 27, is the only part of these different Acts which may be referred to, and the word twelve in that sub-section is made fourteen by the 49 Vic., ch. 49, sec. 11.

The sub-section so amended provides to which General Sessions of the Peace, after conviction, the appeal shall be made.

Then sub-sec. 2 enacts that "the person aggrieved shall give to the prosecutor or complainant, or to the convicting justice for him, a notice in writing of such appeal within ten days [see 49 Vic., ch. 49, sec. 11] after such conviction."

Sub-sec. 3 enacts that "the person aggrieved shall either remain in custody until the holding of the Court to which the appeal is given, or shall enter into a recognizance with two sufficient securities before a justice of the peace conditioned personally to appear at the said Court and try such appeal, and abide by the judgment of the Court thereupon * * and upon such recognizance being given * * the justice or justices before whom such

recognizance is entered into, shall liberate such person if in custody, and the Court to which such appeal is made shall thereupon hear and determine the matter of appeal * * ”

The form of the notice of appeal is given at the end of the 33 Vic., ch. 27. Then sec. 66 of the 32 & 33 Vic., ch. 31, enacts, “ When an appeal has been lodged in due form and in compliance with the requirements of this Act * * the Court * * appealed to may, on the request of either appellant or respondent, empanel a jury to try the facts of the case * * ”

At what stage of the proceedings taken by way of appeal can it be said, “ the defendant has appealed from the conviction ? ”

The first proceeding is the notice of appeal, which begins “ To,” naming the party to be addressed as the prosecutor or complainant. Then it proceeds, “ Take notice that I, the undersigned A. B., of, &c., intend to enter and prosecute an appeal at,” &c., and such notice is to be given to the prosecutor or complainant, or to the convicting justice for him.

The next proceeding is that the defendant must remain in custody until the holding of the Court of Appeal, or enter into a recognizance with sureties conditioned personally to appear at the Court and try such appeal, &c.

The appellant must then lodge the appeal in due form and the Court will proceed to hear it.

What lodging an appeal in due form is, is not said.

If the party remain in custody for want of sureties he is in custody not as part of his sentence, even though imprisonment be awarded for non-payment of the fine, but in custody to abide the result of the appeal.

So if he give a recognizance, it is upon the condition that he shall “ personally appear at the Court and try the appeal,” and if he fail to appear, the recognizance, if estreated, is estreated because he did not personally appear and try the appeal.

In *Regina v. Eyre*, 7 E. & B. 609, the party who had been rated and assessed for the poor rate at a certain

rate, gave notice of appeal to the Sessions of the Peace, and in the notice he notified the parties on the other side he would not try the appeal, but would only enter and lodge it, and petition for a respite till the following Sessions. The adverse party gave him notice they would oppose the petition. At the ensuing Sessions both parties attended, and the appellant claimed to enter and respite the appeal; it was opposed, and the Sessions refused the respite, and as the appellant was not ready to try the appeal, the Sessions dismissed it with costs, on motion by the appellant to quash the order of the Sessions.

It was said, in giving judgment, "The Court of Sessions has power to enter and respite an appeal if a reasonable notice of appeal has been given. It was the duty of the Sessions to compel him to go on, unless there was a reason to the contrary, and it was not obligatory on the Sessions to enter and respite the appeal." See also *Regina v. Lancashire*, 8 E. & B. 563.

There is no express evidence of such notice having been given by the defendant in this case, but his recognizance to enter and prosecute his appeal at the then next Sessions is returned with the other proceedings in the prosecution, and in the ordinary course of proceeding it must have been entered into after a notice of appeal was served; so that, I must presume, the recognizance was entered into in pursuance of it, in consequence of which the Justice does not appear to have proceeded further upon the conviction.

In my opinion, the notice of appeal, which I presume must have been given to the complainant, is the first proceeding on an appeal from the conviction, and that being so, I must hold the defendant cannot maintain this application contrary to the terms of the 7th section of the 49 Vic. ch. 49, unless upon some ground which impeaches the jurisdiction of the magistrate; and probably in some cases not even then—see *Regina v. Wallace*, 4 O. R. 127—and there is no such objection in the many objections that have been taken, excepting that which is stated in the sixth objection, which is that "the conviction is

defective, because distress is ordered in default of immediate payment, and committal in default of distress."

The 46 Vic. ch. 11, sec. 85, (D.), enacts that all penalties under the Act shall be recoverable with costs by summary conviction, "and in case of non-payment of the penalty immediately after conviction, the convicting Justice may commit the person so convicted and making default in payment of such penalty and costs to the common gaol * * for a period of not more than forty days when the penalty does not exceed twenty dollars * *"

The conviction of the defendant is that he "forfeit and pay the sum of five dollars * * and also to pay to Duncan McLaren the sum of \$3.60 for his costs, and if the several sums be not paid forthwith, I order that the same be levied by distress and sale of the goods and chattels of the said Thomas Lynch; and in default of sufficient distress, I adjudge the said Thomas Lynch to be imprisoned in the common gaol of the said county for the space of twenty days, unless the said several sums and all costs and charges of the said distress, and of the commitment and conveying to gaol be sooner paid."

There was no power to direct the goods of the defendant to be levied upon to enforce payment of the fine; the direction therefore in that respect is invalid. The specific punishment was imprisonment, but that specific punishment for non-payment of the penalty has not been imposed, for the imprisonment directed is to be only in default of sufficient distress.

I had this same point before me in the case of *The Queen v. Brady*, lately decided, *ante* p. 358, and I was of opinion, and I am still of the same opinion, that where imprisonment is directed for non-payment of the penalty, the adjudging of a distress of the goods to levy it, and then imprisonment, in case the distress prove insufficient, is invalid in law, and an excess of jurisdiction, and that excess appears on the face of this conviction. *Leary v. Patrick*, 15 Q. B. 266.

In *The Queen v. Brady*, which was a conviction under The Canada Temperance Act 1878, I held that even that

excess of jurisdiction, which was an excess only against what the police magistrate had given judgment for, but was not in excess of the means for raising the penalty, which he had the power to order under the statute, would have been invalid if the defect had not been remedied and cured by sections 117 and 118 of that Act; but there are no such provisions in the Acts which govern this case.

The sections which Mr. Clement referred to as curing this defect, are sections 2 and 3 of the 49 Vic. ch. 49, (D). Section 2 enacts that "no conviction or order made by any justice of the peace, and no warrant for enforcing the same, shall, on being removed by *certiorari*, be held invalid for any irregularity, informality or insufficiency therein, provided the Court or Judge before which or whom the question is raised, or upon perusal of the depositions, is satisfied that an offence of the nature described in the conviction, order, or warrant, has been committed over which such justice has jurisdiction; and that the punishment imposed, is not in excess of that which might have been lawfully imposed for the said offence."

But in this case the punishment imposed is in excess of that which might have been lawfully imposed for the said offence, for the distress of the goods is in excess of the punishment which the justice had any authority to impose.

I must, therefore, make the order absolute to quash the conviction; but I shall do so without costs, because the defendant has taken so many exceptions to the conviction upon which he has failed, and because the merits of the complaint are against him; and according to section 5 of the new Act 49 Vic. ch. 49, I quash the conviction upon the condition, in case anything has been done under the conviction, that no action shall be brought against the convicting justice, or against any officer who may have acted under any warrant which may have issued to enforce the same.

Order absolute, quashing conviction without costs, no action to be brought against the convicting justice or any other officer.

[QUEEN'S BENCH DIVISION.]

REGINA V. McDONALD.

Conviction—Highway—Unlawfully and maliciously removing gate from—32-33 Vict. ch. 22, ss. 29, 60, (D.)—"Fair and reasonable" supposition of right—Jurisdiction of Justice.

S. owned lot 38 in 8th concession of N. In 1866 he sold the west-half of the lot to complainant, reserving a strip of thirty feet along the north line thereof as a road for himself and successors in title to and from the east-half of the lot. S. put up a gate at the west limit of the land where it met the highway, which gate had been there from 1866 until removed by the defendants. Defendants were successors in title to S. and removed the gate in question as an obstruction, and were convicted for unlawfully and maliciously breaking and destroying the gate erected at the west end of said road, as the property of the complainant: *Held*, that defendants were acting in good faith in claiming the right to remove the gate, and under fair and reasonable supposition of right, and the conviction was therefore quashed.

Held, also, that the question of a fair and reasonable supposition of right to do the act complained of was a fact to be determined by the justice, and his decision upon a matter of fact would not be reviewed, but that this rule did not apply where, as here, all the facts shewed that the matter or charge itself was one in which such reasonable supposition existed; that is, where the case and the evidence were all one way and in favor of the defendant.

Regina v. Malcolm, 2 O. R. 511, distinguished.

Quære, whether a gate across a right of way is an obstruction in law.

Held, also, that the proviso in 32-33 Vic. ch. 22, sec. 60, is to be read as applicable to sec. 29 and to the whole Act.

September 17th, 1886. *Kappele* obtained an order *nisi* to quash the conviction in this case on the following grounds:

1. That there was no evidence to sustain it.

2. The evidence shewed the defendant had fair and reasonable supposition that he had a right to do the act complained of, and he acted under a *bonâ fide* belief he had such right in the removal of the gate in question, and the justice should not have proceeded with the charge.

3. The justice delivered a written judgment immediately at the close of the case, which had been written out before the close of the case, and before the defendant attempted to give any evidence.

4. The gate removed was, as appeared by the evidence, upon the highway, and the defendant had the right to remove it.

The evidence shewed that the late Mr. Stayner owned the whole lot, number 38, in the 8th concession of Nottawasaga. He sold in February, 1866, the west half or west one hundred acres to Mr. Watson, the complainant, and conveyed the same by deed, reserving a strip of thirty feet wide along the north line of the west half, as a way for himself, his heirs, &c., to and from the highway at the west of lot 38 to and from the east half of the lot.

The complainant said Mr. Stayner agreed to put up a fence along the south side of the lane reserved, and to put up a gate at the west limit of the land where it met the highway.

Such fence and gate were about that time put up, and had been there ever since, until removed by the defendant. The defendant bought the east half of the lot from Mr. Stayner in 1878, and took possession at that time, and still had possession. The gate was removed on the 18th of June, 1886, and on the 23rd of the month the information was laid, for that the defendant unlawfully and maliciously did break, demolish and destroy the said gate erected at the west end of a private lane on the west half of lot 38, in the 8th concession of Nottawasaga, the property of the complainant.

The evidence was to the following effect:

The complainant said he was the owner of the west half of the lot, and bought as before mentioned. The gate had been there for twenty years without any objection. (The gate was supposed to be on the line of the lot and street.)

In cross-examination he said the owner of the east half had the right to use the lane without any obstruction: that they could not so enjoy it without opening and shutting the gate: that the gateway was about twelve feet wide, and there was a fence on the east side of it of nine feet. He said: "I claim to have the right to put a gate there by a verbal agreement with Mr. Stayner. I will not swear the gate is not on Hurontario street."

Thomas Robinson said he saw the defendant and Wagner lift the gate and set it against the fence.

On cross-examination he said : " I had the line run by a surveyor, and according to that survey the gate would be on the street. The lane has been closed for eighteen or twenty years. It has been in dispute."

Christopher Johnson said he saw the defendant and Wagner sawing off the posts of the gate : that they then kicked the boards off the gate posts ; then sawed the board off from the south side of lane, and threw the gate over into the orchard : that they sawed the posts down, and lifted the gate and all : that he did not know whether the gate was on the street or on the line.

Frederick Warner gave the like evidence as the next preceding witness.

That was the case for the prosecution.

For the defence :

The defendant said he owned the north seventy acres of the east half of the lot ; he bought in 1878, and he sold the south thirty acres of the east half, [having bought the whole of the east half] to Wagner. He said ; " I claim to have the right of way without any obstruction : at the time I bought the gate was off : after that the gate was put on : I objected to it, and continued to object till I sold to Wagner I served Watson and his tenant last October with a notice to remove the gate and obstructions : the gate was a serious obstruction : I believe it stands on the street, but I do not exactly know the line. In removing the gate I consider I was doing nothing more than I had the right to do under the reservation : did not do it from ill-feeling to the complainant : did not do unnecessary damage : I did not say I would not bother with the gate if Watson was not so short with me."

William E. Wagner, who was convicted for the same act separately, gave evidence substantially as McDonald had given his evidence.

Frederick Warner said :

" McDonald and Wagner told me if Watson had not been so short with them when they gave him notice, they would not have bothered about the gate."

On cross-examination he said :

“I will not say Watson did not tell me within the last few months if the defendant had not been so saucy to him he would not keep the gate up, or words to that effect.”

The conviction was made on the 23rd of June in the terms of the information, imposing two dollars fine, and four dollars and ten cents costs, and one dollar and fifty-one cents damages to be paid, in five days; and if not paid, imprisonment for twenty days.

October 15th, 1886. *Kappele*, in support of the order *nisi*. There was a question of right between the parties: *Regina v. Malcolm*, 2 O. R. 511; *Regina v. Davidson*, 45 U. C. R. 91.

The proceedings were carried on under the 32 & 33 Vic., ch. 22, sec. 29 (D), and not under section 60 of that Act.

The gate on the lane is an obstruction to the defendant's right of way, and he had the right to remove it: *Heward v. Jackson*, 21 Gr. 263; *Kastner v. Beadle*, 29 Gr. 266; *Regina v. Bradshaw*, 13 U. C., L. J. N. S. 41; 38 U. C. R. 564, in Appeal.

Aylesworth, contra. Section 60 referred to takes away the jurisdiction of the justice, if the party acted under a reasonable supposition he had the right to do the act complained of: *White v. Feast*, L. R. 7 Q. B. 353. The justice would have greater latitude in forbearing to try a case under section 29 than under section 60. Under the latter section the magistrate has jurisdiction unless the defendant had a reasonable supposition that he had the right to do the act. It is not therefore the mere *bonâ fide* belief of the defendant, but the reasonable belief which excludes the justice from proceeding. But there is in fact no difference between the effect of the two sections, for the word *herein* in section 60 is not confined to that section alone, but by the Interpretation Act 1867 *herein* applies to the whole of that Act. Whether the gate was on the highway or not was a question of fact, and not of title, and the

magistrate has found the fact against the defendant. He referred to *The Queen v. Malcolm*, 2 O. R. 511; *Williams v. Adams*, 2 B. & S. 312; *The Queen v. Richmond*, 8 Cox 314; *The Queen v. Dodson*, 9 A. & E. 704.

October 19, 1886. WILSON, C. J.—The questions are :

1. Whether the defendant under the 32 & 33 Vic. ch. 22 section 29 (D), unlawfully and maliciously broke or destroyed the gate at the west end of the lane.

In that enquiry the proviso in section 60 is to be read as applicable to section 29. That proviso is :

“Provided that nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of.”

The word *herein*, in section 60, is made applicable to the whole Act under the Interpretation Act 1867, section 6, subsection 4, which is : “Whenever the word *herein* is used in any section of an Act, it is to be understood to relate to the whole Act, and not to that section only.”

2. If he did, is he nevertheless entitled to be acquitted if the justice had found the gate was placed upon the highway, and not upon the prosecutor's land ?

The first is the principal question.

It is quite clear an easement was created by the conveyance between Mr. Stayner and the prosecutor in February, 1866; and there is evidence to shew the fence and gate on the line were made by Mr. Stayner, the grantor of the land, and who became grantee of the easement of the right of way : *Durham and Sunderland R. W. Co. v. Walker*, 2 Q. B. 940.

I do not think it necessary to enquire whether or not Mr. Stayner or his grantees of the easement could maintain this gate against the prosecutor's will. If the owner of land give another the right to do work, or make an erection and the like upon his, the licensor's, land, and the licensee does the work or makes the erection, the licensor of the easement, although by parol, cannot revoke that

license or grant, as in *Liggins v. Inge*, 7 Bing. 682. See also *Davies v. Marshall*, 10 C. B., N. S. 697, in which latter case the act was done on the licensee's own land, but it operated to the prejudice of the licensor's land. If I were to make that enquiry I would be going into matter of title.

If the gate put up was the gate of the licensee, Mr. Stayner, and of the defendant, or his grantee, and was not erected by agreement between the parties, he could remove it if and when he pleased. I need not examine the case in that light, and it is not necessary to do so; for if the legal effect of the evidence is to shew the gate to be the gate of the defendant, as the grantee of the easement, it having been erected by his grantor, the prosecutor must fail if the title be not raised, and the gate is the property of the defendant; and equally he must fail if it is not the property of the defendant, but the title is actually raised. A right of way may however be granted, subject to a gate being put upon the way; and the evidence shews that was probably the case in the arrangement between Mr. Stayner and the prosecutor; but even then, I do not see any obligation upon the prosecutor to maintain the fence or gate. It may be the defendant is under that obligation, although I do not say he is. The prosecutor may grant a right of passage over the same lane to any other he pleases, and he may of course use it as a way of passage for himself and all his licensees.

There is no reason to doubt that the defendant was acting in good faith in claiming the right to remove the gate, and under a reasonable supposition that he had the right to do so. In that case the following authorities are applicable.

The prisoner had been fighting with persons on the street, and threw a stone at them which struck a window, and did damage to an amount exceeding £5. He was indicted under the "Malicious Injury to Property Act," for "unlawfully and maliciously" causing the damage.

The jury convicted him, finding he threw the stone at the people he had been fighting with, intending to strike

one or more of them, but not intending to break the window.

Held, the finding negatived the malice, actual or constructive, and the conviction was therefore quashed. The jury might have found the act was malicious, because they might have thought the prisoner knew the natural consequence of his act was to break the glass, although that was not his wish ; but the jury did not so find : *Regina v. Pembliton*, L. R. 2 C. C. 119.

The belief, though erroneous, of a prisoner in the existence of a right to do the act complained of excludes criminalty : *Regina v. Twose*, 14 Cox C. C. 327.

The case of *Small v. Ware*, 47 J. P. 20, I take from Mews Digest 1883, p. 131. In a colliery certain horses were worked while suffering from raw wounds. Held the justices were wrong in convicting Small of ill-treating the horse merely because he was manager, as it was not shewn he was present or had any notice or knowledge of the state of the horse, for some knowledge of the matter was an essential ingredient of the offence.

The following cases do not *apparently* go so far in favor of the accused :

Regina v. Prince, L. R. 2 C. C. 154. The prisoner was convicted under the statute which enacts that whosoever shall "unlawfully take any unmarried girl, being under the age of sixteen, out of the possession and against the will of her father, * * * shall be guilty of a misdemeanor." It was proved the prisoner did take the girl, and that she was under sixteen, but that he *bonâ fide* believed and had reasonable ground for believing she was over sixteen, and the question was, whether it was a part of the charge that the prisoner knew the girl was then under sixteen.

Blackburn, J., who was one of the Judges who gave judgment, said :

"The words *knowingly* or *maliciously*, or any other words that can be said to involve a similar meaning, are not in the statute. The intention of the Legislature

sufficiently appears to have been to punish the abduction, unless the girl, in fact, was of such an age as to make her consent an excuse, irrespective of whether the prisoner knew her to be too young to give an effectual consent, and to fix that age at sixteen * * The man who has connection with a child, relying on her consent, does it at his peril, if she is below the statutable age." He refers to several cases in support of that view.

Bramwell, B., said, "Unlawfully means without lawful cause, and the prisoner had no such cause."

There was sufficient in the act of the prisoner contrary to the words of the statute to constitute the *mens rea*, which it is necessary there should be in every case to make the act a crime or offence. The conviction was affirmed. In *The Queen v. Bishop*, 5 Q. B. D. 259, the defendant was convicted of receiving two or more lunatics into her house, not being a registered asylum or hospital, or a house duly licensed under the statutes. The jury found the defendant honestly, and on reasonable grounds, believed they were not lunatics.

Held, the belief was immaterial, and the conviction was right.

It was said receiving lunatics means receiving them *as lunatics* and to be treated as such, and on argument it was said the object of the statute was to prevent such persons from being put under a system of restraint without the knowledge of the commissioners in lunacy. *Cundy v. LeCocq*, 13 Q. B. D. 207, shews it is an offence for a person licensed to sell intoxicating liquor to any drunken person, although the person so selling it is not aware the person served was drunk, and had shewn no evidence of intoxication. None of these statutes are similar to the one now under consideration, for the Act in question does contain the qualifying words "maliciously and unlawfully," and also the very important protective words that "nothing herein contained should extend to any case where the party acted, under a fair and reasonable supposition he had a right to do the act complained of."

I am of opinion the defendant, upon the facts and evidence, should not have been convicted.

I have read the decision of my brother Armour in *Regina v. Malcolm*, 2 O. R. 511. I quite agree with him that whether the defendant has shewn a reasonable supposition on his part, that he had a right to do the act complained of is a fact to be determined by the Justice, and his decision upon a matter of fact will not be reviewed. But that means, firstly, that the defendant has given evidence to that effect, and secondly, that there is a conflict of testimony on the point. It does not apply where the whole facts shew that the matter or charge itself is one in which such reasonable supposition exists; or, in other words, that the case and the evidence are all one way in that respect, and in favour of the defendant, which is the case here. I am, therefore, of opinion the defendant should not, upon the facts and evidence, have been convicted.

I am not satisfied it was the prosecutor's gate. He did not put it up, but Mr. Stayner, the grantee of the easement did so. The prosecutor was not bound to maintain it. He could not have been sued by the defendant for not maintaining it. Whether the defendant could be required by the prosecutor to maintain it, is not necessary to say. It may be that neither party could remove it without the consent of the other; but I am of opinion the defendant had not the right to remove it without the consent of the grantor. It had been there more than twenty years, and it certainly was not deemed to be an obstruction to the right of way, as it was erected by the grantee of the right of way, with the assent of the grantor, and it may be the defendant might be enjoined to replace it, at the instance of the prosecutor, so long as the right of way exists. But that is a very different matter from a criminal prosecution for breaking the gate which is called the plaintiff's gate, and involving the enquiry whether the defendant unlawfully, maliciously, or without a reasonable supposition of right to do the act complained of, which is called an offence.

The conviction on this ground must be quashed.

As to the question whether the gate was on the highway

or not, it is useless to say. I may say such an enquiry does not, in my opinion, raise the matter of title. If it be upon the highway, that is a fact which the justice has found against the defendant; and if wrongly found then it was on the land of the prosecutor; but even then, for the reasons stated, the conviction cannot be supported.

During the argument a good deal was said that the erection of a gate on a right of way, put up by the grantor of it, after the grant made, was necessarily an obstruction which the grantee could remove. That, let me repeat, is not this case. This gate was put up by the licensee, with the consent of the licensor, at the time, and in pursuance of a verbal agreement made between them when the grant was made.

I stated, on the argument, I had a recollection of a decision that a gate, put upon a way by the grantor after the grant, was held not to be an obstruction of the right of way. The reference which I had in mind, is the case of *Ewing v. Colquhoun*, 2 App. Cas. 839, at pp. 846-871; and the cases there cited are *Sutherland v. Thomson*, 3 Court of Sess. Cases, 4th Series, 489; *Galbraith v. Armour*, 4 Bell's App. 374, and *Marquis of Breadalbane v. MacGregor*, 7 Bell's App. 43. I may also refer to *Bateman v. Burge*, 6 C. & P. 391; *Mercer v. Woodgate*, L. R. 5 Q. B. 26; *Arnold v. Blaker*, L. R. 6 Q. B. 433; *James v. Hayward*, Cro. Car. 184; *Kidgill v. Moor*, 9 C. B. 364.

There may be a difference between a swing gate across a mere footway and a swing gate across a carriage way. In the former case it does not seem to be an obstruction; in the latter case it may be.

That is of no consequence at present, as it was not the plaintiff who put up the gate, but the grantee; and that which the grantee has done has remained just as he made it.

I shall quash the conviction, but without costs, and on condition that no action be brought by the defendant in case anything has been done by the Justice or any of the officers in enforcing the conviction; and the parties will

have to settle their rights in a Civil, not in the Criminal Court. But they will be wise if they make an amicable arrangement between themselves, which, as neighbours, they ought to do.

*Conviction quashed, without costs ;
no action to be brought.*

[QUEEN'S BENCH DIVISION.]

REGINA V. SWALWELL.

Livery stables—Municipal Institutions Act 1883, sec. 510—By-law imposing license fee—Conviction for contravening—Certiorari—Recognizance—49 Vic. ch. 49 sec. 8 (D.)—"Shall no longer apply," meaning of—"Owner."

Held, that since the passing of the Dominion Statute 49 Vic. ch. 49 sec. 8, there is no longer necessity for a defendant, on removal by *certiorari* of a conviction against him, to enter into the recognizance as to costs formerly required.

Held, also, that the words "shall no longer apply" in sec. 8 mean that from the day of the passing of the statute the Imperial Act shall no longer apply, not that the Imperial Act shall cease to have application in Canada upon a general order being passed under sec. 6 of the Dominion Act.

The Municipal Act, 1883, sec. 510, authorizes the licensing of owners of livery stables and of horses, &c., for hire.

A by-law passed under this section required every person owning or keeping a livery stable or letting out horses, &c., for hire to pay a license fee. Defendant was convicted under this by-law, for that "he did keep horses, &c., for hire" without having paid the license fee.

Held, that the conviction was in conformity with both statute and by-law.

October 26, 1886. *Watson* moved to quash the conviction in this case made under a by-law of the Town of Almonte, passed under the Municipal Act, 1883, sec. 570, respecting the licensing of owners of livery stables.

There was a preliminary objection made to the motion that no recognizance had been filed, the *certiorari* having been obtained by the party convicted.

Aylesworth, in support of the objection, argued that as the defendant had not given the recognizance under the practice of the Court the case could not be heard: that

sections 6 and 8 of the Dominion Act, 49 Vict. ch. 49, did not apply, because it was by the practice of the Court, and not by the Imperial Act, that a recognizance in the case of convictions is required. The Court of Queen's Bench, by its own practice, independently of the Act 5 Geo. II., ch. 19, sec. 2, required a recognizance to be entered into to pay the prosecutor his costs in case the conviction was affirmed; and the repeal of that Act by the Act of last Session did not take away the power of the Court to follow its old established practice in requiring a recognizance to be entered into in all cases in which a writ of *certiorari* was granted. He referred to *Paley on Convictions*, 6th ed., 441, *et seq.*

Watson, contra. The 8th section of the Act of last Session, repeals the section of the 5 Geo. II., ch. 19, sec. 2, which requires a recognizance to be given, and substitutes for it the 6th section of the Act of last Session; but the 6th section has no operation until the Court having jurisdiction shall "prescribe by general order" that no motion for a *certiorari* to quash a conviction, &c., shall be entertained, unless the defendant has entered into a recognizance with sureties, &c., and no such order has yet been made, so that this motion is regularly made without entering into the recognizance.

October 29, 1886. WILSON, C. J.—It will be better to settle the preliminary objection before disposing of that part of the motion which is covered by the order *nisi*.

It is true the Court considered the Act of the 5 Geo. II., ch. 19, sec. 2, did not apply to *convictions*, because the Act mentions only *judgments or orders*, and a conviction was said not to be a judgment or order, and so not within the Act requiring a recognizance. It appears, also, it was the practice of the Court not to require a recognizance under the Imperial Act to be entered into where a *certiorari* was granted to quash a conviction, and the case of *The King v. Jenkinson*, 1 T. R. 82, is referred to in support of that practice and the construction of the statute.

In that case, which was to quash a conviction, the pro-

ceedings were removed by *certiorari*, and there was no recognizance, and it was therefore doubted whether costs could be taxed against the defendant without a recognizance, and Lord Mansfield, C. J., said: "By the rule of law the king neither receives nor pays costs. We are aware of the mischief of granting writs of *certiorari* for vexatious purposes, and it is discretionary in the Court whether they will grant them or not. For the future we will oblige the party applying for a *certiorari* to enter into a recognizance to pay costs; but we are not authorized to grant them by the 13 Geo. II., ch. 18 (*quære* 19) without a recognizance."

In *Paley* on Convictions, 6th ed., 441, it is said the practice of the Court so established was founded upon an *extension* of the Act of George II.

There are two points in the judgment just stated which should be considered; one is, that if the *certiorari* has been obtained vexatiously costs may be given, although there is no recognizance: *Regina v. Edmonds*, L. R. 9 Q. B. 598. The other is that it is said in *Paley*, 395, and note O., 307, 391, referring to the Imperial Act, 12 and 13 Vic. ch. 45, sec. 7, to be the better opinion that under the words *judgment* or *order* a *conviction* is included, and that the 5 Geo. II. ch. 18, expressly mentions *convictions*.

It would appear therefore that a recognizance was *in law* required by the 5 Geo. II., ch. 19, sec. 2, in the case of a *certiorari* granted to remove a conviction, but that the Court, according to the decision in 1 T. R. 82, was not of that opinion; and it directed that on all motions thereafter made for a *certiorari* to quash a conviction, a recognizance should, as a rule and matter of practice, be entered into.

If the Court rightly directed that a recognizance should be given independently of the statute by virtue of their own inherent vigour and authority, the repeal of the 2nd section of the 5 Geo. II., ch. 19, will not avoid the rule of practice which was so laid down requiring a recognizance to be entered into in all cases of the kind. But if the rule of practice was founded "upon an extension" of the

enactments of the statute—that is, I presume, upon the equity of the statute—and the enactment in question is repealed, the rule of practice must fall with the statute.

The writ is not, when moved for by the defendant, grantable of right, but in the discretion of the Court upon good cause shewn. In that case the Court would, I should say, have the right to require the giving of a recognizance, and there certainly has been a long prevailing practice to that effect.

The 49 Vic. ch. 49, sec. 6, is based no doubt upon the assumption that the Act of George II., having required and requiring a recognizance as well in the case of convictions as in the case of judgments and orders; and the “better opinion” of later years, referred to in *Paley*, being that convictions were and are within the terms of that Imperial Act; and the presumption being that the Legislature legislate with respect to the law existing at the time of such legislation—are reasons for holding that our own Legislature by the 8th section of the 49 Vic., did expressly mean, for some reason or other, to repeal the 2nd section of the Imperial Act, and to provide afresh by the 6th section for the giving of a recognizance in cases of convictions, as well as of orders or other proceedings whenever the Court prescribed by general order for the giving of a recognizance.

The 8th section of our Act is, that the 2nd section of the Imperial Act “shall *no longer apply to any conviction, order, or other proceeding* ;” shewing that our Legislature was of the opinion that *convictions* were within the terms of the Imperial Act. And if it had not been for that declaration and assertion of the law I should have thought our legislature were of a different opinion, and were desirous merely of removing the doubt by the express enactment of the 6th section. If it be assumed that our legislature was of opinion that convictions were and are within the terms of the Imperial Act, it would seem there was no necessity for enacting that the 2nd section of the Imperial Act should no longer apply, and re-enacting in effect the very substance of the 2nd section.

The only other point in connection with this preliminary objection is, whether the terms of the 49th Vic., sec. 8, constitute an immediate repeal of the 2nd section of the Imperial Act, or are only a declaration that such section shall no longer apply when or after the Court under the 6th section has prescribed by a general order for the recognizance and *substituted* the general order in place of the said 2nd section.

Do the words *shall no longer apply*, which are widely different from words which declare the 2nd section "shall be and the same is hereby repealed," mean that the 2nd section shall from the immediate passing of the Act *no longer apply*, or only that where the general order under the 6th section is substituted for it? Substitute is to put or place a person or thing, as for instance, the general order, in the stead or place of some other person or thing. *Substitute* does not necessarily imply that the act of substitution of one person or thing, for another person or thing must be at the same time. A person or thing may be removed at one time, and another person or thing substituted for it upon the next day, or the next month, or the next year.

There might be some reason to contend that as the 2nd section of the Imperial Act is not applicable to this country, as repealed in express terms, that the sixth section of our Act, or the general order under that section, is to be substituted for the said 2nd section, and that the said 2nd section is to remain in force until the the general order stands in its stead by way of substitution; and that the words "shall no longer apply," may be read as referable to the time when the substitution is perfected, if the *general order* was substituted for the 2nd section of the Imperial Act; but it is not the general order which is to be substituted for the 2nd section of the Imperial Act, but the 6th section of our Act which is to be substituted for it; and when that section takes the place of the said 2nd section, the prescribed general order has then to be made, and that necessarily must be after the 6th section

is in force, and therefore after the said 2nd section has ceased to apply, or, in other words, has been repealed.

I am of opinion the declaration that the 2nd section of the Imperial Act, "shall no longer apply," has reference to the time of the passing of our Act, and that the 6th section of our Act is and was at the same instant substituted for it; and that the 6th section cannot be made operative until the Court "has prescribed by general order" respecting the conviction, and that order has not yet been made.

I am also of opinion that as a recognizance under the 2nd section of the Imperial Act did include and extend to convictions, as well as to judgments or orders "according to the better opinion," and as the 8th section of our Act expressly asserts that the said 2nd section did apply to convictions as well as to judgments or orders, by the words that "the 2nd section * * * *shall no longer apply to any conviction,*" &c., that the said 2nd section has not since the passing of our Act longer applied in this country; and that in this case the return to the conviction having been made after the passing of our Act, was and is a good return without the recognizance required by the Imperial Act, although the *certiorari* was issued before the passing of the Act.

I must now proceed with the objections to the conviction, which are taken under the Municipal Act, 1883, section 510, and under section 24 of the town by-law which has been made under section 510 of the statute.

The section of the Act is, that the council of every town and incorporated village may pass by-laws "for regulating and licensing the owners of livery stables, and of horses, cabs, carriages, omnibuses and other vehicles for hire; for establishing the rates of fares to be taken by the owners or drivers, and for enforcing payment thereof."

The by-law passed under that enactment provides, by section 24, that "Every person owning or keeping, or intending to own or keep a livery stable, or letting or intending to let out horses or carriages or other vehicles of travel for hire in the said town of Almonte, shall first take out and obtain a

license for the same and pay the license fee fixed for the same, and which license, when granted, shall authorize the person in whose name it is granted, and no other, to keep a livery stable and to carry on the business or occupation of letting out horses and carriages or other vehicles of travel for hire or reward, and no person shall keep a livery stable or carry on such business in the said town without having first obtained and paid for such license ;” and the conviction is that the defendant “did keep horses and vehicles for hire in the said town of Almonte without having first paid the license fee as required by by-law No. 63 of the said town.”

The objections to the conviction are :

1. There is no evidence to support the conviction, and the same is contrary to law and to the provisions of the statute in that behalf.

2. That under the statute the license fee referred to can legally be imposed only upon the owners of livery stables, and there is no evidence in this case of ownership.

3. The by-law is invalid and is contrary to the provisions of the statute.

Mr. Watson argued that the conviction was void because the by-law provides for licensing the owners of livery stables, and it does not appear the defendant was such owner.

Mr. Aylesworth contended that as to the objection taken during the argument, that the conviction did not state the defendant kept vehicles for hire in Almonte, this had not been taken in the order *nisi*.

It appears that section 510 of the statute provides for regulating and licensing the owners of horses, cabs, carriages, omnibuses and other vehicles for hire ; and that the by-law provides that every person owning or keeping * * * a livery stable, or letting * * * out horses, carriages, or other vehicles for hire in the town shall take out a license ; so that not only the owner of the livery stable, but owner of horses, &c., is specified in the statute, but in the by-law as well, under the words “ every

person owning * * * a livery stable or letting
* * * out horses, &c., for hire."

Now the by-law requires that all such persons shall obtain a license for that purpose, and pay the fees therefor, "and no person shall keep a livery stable or carry on such business," [*i.e.*, of letting out horses, &c., for hire] "in the town without having first obtained and paid for such license."

I do not see what objection there can be to the conviction, which finds that the defendant did keep horses and vehicles for hire in Almonte without first having paid the license fee required by the by-law. The only exception which can be taken to the by-law or conviction is that the statute mentions the *owners* of livery stables, and of horses, &c., while the by-law mentions the owning or keeping of livery stables or "the letting out of horses for hire;" and the conviction of the defendant is for that he "did keep horses, &c., for hire, &c.;" and it can only be said that the owner of horses for hire mentioned in the statute is not the person mentioned in the by-law, and as a consequence the business of *letting out* horses, &c., for hire is altogether different from being the owner of such horses.

Then it is said, as the statute refers to the *owner*, and the by-law to the person *letting out* horses, who may not be the owner, the by-law is not sanctioned by the statute; and also that as the conviction is for keeping horses, &c., for hire, &c., the conviction is neither within the terms of the statute, nor the terms of the by-law. The term *owner* is referred to in several cases.

In *Lister v. Lobley*, 7 A. & E. 124, the trustees under a turnpike Act were empowered to enter on land and pull down buildings, making satisfaction to the *owners or proprietors*.

Held, the compensation was payable not only to the owners of the fee, but also to lessees for a term of years. The plaintiff was a tenant for years.

Lord Denman said the words "owner or proprietor have no definite legal meaning; they may refer to owners having

either the whole or partial interests. These are properly speaking owners in each case. It would be unjust if the trustees were required to make satisfaction to the tenant in fee for any loss or damage which another party might sustain."

Littledale, J., said: "These are not legal terms, but they must be understood from their ordinary use. I do not see that *owner* necessarily means the tenant in fee. In common sense one would ask whose is the land? Who has the beneficial rent? How can the tenant in fee be the owner? Suppose there were a lease for ninety-nine years with no rent reserved, in common sense you would call the lessee the owner. The word *owner* has therefore no definite meaning. So as to the word *proprietor*."

In *Caudwell v. Hanson*, L. R. 7 Q. B. 55, the appellant owned the fee. He agreed with L. to grant a lease for 99 years of certain plots of building land within the limits of the Metropolitan Building Act, 1855, so soon as L. should have erected houses thereon. L. built houses. The appellant became entitled to his first quarter's rent in September, 1870. The District Surveyor, the respondent, surveyed the houses on the 26th of October and gave a bill of his fees to L., who became insolvent. The respondent then claimed his fees from the appellant.

Section 3 of the Act defined *owner* as follows: "Owners shall apply to every person in possession or receipt either of the whole or any part of the rents and profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year, or for any less term, or as tenant at will." Section 51 enacted the surveyor should be paid his fees, first, from the builder, although he only built the structure; secondly, from the occupier of the building if the builder did not pay; thirdly, from the *owner* of the building if the occupier did not pay; and Lush, J., in giving the judgment of the Court, said:

"In what sense is the word *owner* used? It is used in the popular sense and means the person who employed

the builder to build the house for him. * * The interpretation clause was intended to exclude the argument that the person who has all the benefit of the building is not owner because he has not a legal title. * * The tenant of the fee is in no sense liable; the person liable was the intended lessee alone who entered into the agreement to take the land for 99 years, and was entitled to a lease to be granted by the appellant * * He was at the time of the building the person who was the owner, and the person entitled to its immediate benefit."

In *Dawson v. The Midland R. W. Co.*, L. R. 8 Ex. 8, the plaintiff, with the owner's assent, had his horse in the owner's field. The railway company had not maintained, as they should have done, the fences between their line and that of the owner of the land which adjoined the railway: Held, that as they were required to maintain a fence between their line and the land of the adjoining owners and proprietors, they were liable to the plaintiff for the loss of his horse which had strayed from the field by the defect of the company's fence, as the plaintiff had his horse in the field with the license of the occupier of the field.

In *Lewis v. Arnold*, L. R. 10 Q. B. 245, the Town Police Clauses Act, 1847, gave the commissioners power to send engines with their appurtenances and firemen beyond the limits of the special Act for extinguishing fire in the neighbourhood of the limits, and the owner of the lands and buildings where the fire happened shall, in such case, defray the actual expense which may be thereby incurred:

Held, the occupier was the owner of the land within the meaning of the Act, and was liable for the expenses of sending the engine to extinguish a fire in his haystack.

Mellor, J., said: "Owner of land and buildings in the section of the Act includes the occupier."

Lush, J., said: "The occupier is the owner of lands and buildings within the meaning of section 33."

I shall just refer to other cases I have looked at: *The Queen v. Lee*, 4 Q. B. D. 75; *The Great Eastern R. W.*

Co. v. The Hackney District Board of Works, L. R. 8 App. Cas. 687; *Williams v. The Wandsworth Board of Works*, 13 Q. B. D. 211; *Hughes v. Sutherland*, 7 Q. B. D. 160; *Richardson v. Williamson*, L. R. 6 Q. B. 276. When therefore the statute mentions "owners of livery stables or of horses, &c., for hire," and the by-law mentions "every person owning or keeping a livery stable or letting horses, &c., for hire," the statute and the by-law are speaking of the same class of persons; that is, persons who own or keep a livery stable or let horses, &c., to hire. The term livery stable means of itself the carrying on the business for which a livery stable is owned or kept. In Worcester's Dictionary it is said to be "a stable where horses are kept and let out to hire." An *owner* of a livery stable or of horses, &c., for hire, is the same, in my opinion, as letting horses, &c., for hire, the word *owner* having no strict, technical, or legal meaning, but being a word of a very flexible nature, and both in the statute and in the by-law it is manifestly used in its ordinary popular and colloquial sense.

The conclusion, therefore, in my opinion, is quite in conformity with both the statute and the by-law, for the charge that the defendant "did keep horses, &c., for hire," is a statement in effect that he owned or kept a livery stable and horses, &c., for hire.

The evidence is plainly sufficient to sustain the charge, and to authorize the conviction.

I dismiss the motion, with costs.

Dismissed, with costs.

[COMMON PLEAS DIVISION.]

MCQUAY ET AL. V. EASTWOOD.

Medical practitioner—Malpractice—Evidence—Inconsistent finding of jury.

In an action against a medical practitioner for malpractice the plaintiff must prove not only that there was negligence or want of skill on the part of the defendant, but also that the plaintiff was injured thereby.

In this case, which was for negligence and want of skill in the treatment of the plaintiff in her confinement, the jury found that the defendant was guilty of such negligence, in that he was remiss in giving instructions to the nurse, and in not seeing that his instructions were properly carried out.

Held, that the inconsistency in the finding would not entitle the defendants to judgment dismissing the action, but at most to a new trial if there was evidence to go to the jury thereon.

Held, however, that there was no evidence from which it could reasonably be inferred that the injury complained of by the plaintiff was attributable to either want of skill or care, or negligence by defendant; and judgment was therefore directed to be entered dismissing the action.

THIS was an action by the plaintiffs against the defendant, as a physician and accoucheur, retained to treat the female plaintiff in her confinement and illness consequent thereon, for negligence and want of skill in his treatment.

The plaintiffs in their statement of claim, as their cause of complaint, alleged that the defendant attended the delivery of the female plaintiff, and, in the course of his treatment thereat, negligently and unskilfully made use of an instrument or instruments, and by reason of such negligent and unskilful use the said female plaintiff was seriously injured and wounded; and the said defendant otherwise treated the said female plaintiff negligently and unskilfully in the said delivery; and the female plaintiff after her said delivery became seriously ill, and the defendant negligently, improperly, and unskilfully treated her for such illness. The defendant wrongfully neglected and refused, although the critical state of the female plaintiff in the course of such illness required it, to call in further medical aid and skill, and wrongfully concealed from the male plaintiff, the husband, the critical and dangerous state in which the female

plaintiff was ; and in consequence of such neglect further medical aid was not called in for a long period.

The cause was tried before Armour, J., and a jury, at Toronto, at the Spring Assizes of 1886.

The evidence disclosed that the defendant had used instruments : that there was laceration of the perineum and cervix of the female plaintiff ; and that she had a serious illness.

The learned Judge submitted certain questions in writing to the jury, which with their answers were as follows :

1. Was the defendant guilty of negligence in his treatment of the female plaintiff ? Answer. Yes.

2. If so, in what particular or particulars did such negligence consist ? Answer. That the doctor was remiss in giving his instructions to the nurse, and in not seeing that his instructions were properly carried out.

3. What was the particular physical result to the female plaintiff from such negligence ? Answer. By being invalidated up to the present time with no certainty of a permanent cure.

4. What damages ought the female plaintiff to recover ? Answer. None.

5. What damages ought the male plaintiff to recover from the defendant ? Answer. \$359.

On these answers the learned Judge directed judgment to be entered against the defendant, with \$350 damages to the male plaintiff, and without damages to the female plaintiff, and with costs of suit.

In Easter sittings, the defendant by notice of motion and also by order *nisi* moved to set this judgment aside, and to enter judgment for defendant, dismissing the action ; or for judgment of nonsuit ; or for a new trial, on the ground that there was no evidence to go to the jury that the defendant negligently and unskilfully made use of an instrument by reason whereof the female plaintiff was injured or wounded, or that the defendant otherwise treated the female plaintiff negligently or unskilfully in her

delivery ; or that the defendant negligently and unskilfully treated the female plaintiff for her illness as in the statement of claim mentioned ; and also, among other grounds not material to be noted, that there was no evidence to support the finding of the jury, that the defendant was remiss in giving his instructions to the nurse, and in not seeing that the instructions were properly carried out, and that by reason thereof the female plaintiff was invalidated up to the day of trial, with no certainty of a permanent cure ; and it was no part of the defendant's duty to give such instructions to the nurse, or to see that the same were properly carried out.

During Hilary sittings, February 1, 1886, *Lount*, Q.C., and *Farewell*, supported the motion and order. The cause of action as laid in the statement of claim entirely failed, and matters which came out in the evidence were seized upon as giving a cause of action, namely, that the defendant was remiss in giving instructions to the nurse, and in not seeing that her instructions were carried out. The nurse was the sister of the female plaintiff, and came at her request, and not at the doctor's, and she was supposed to be a woman of great experience in these kind of cases. There was no evidence to shew that the doctor was remiss ; but, on the contrary, that he gave all proper instructions. Nothing has been suggested that he could have done that would have avoided the trouble. It was also no part of doctor's duty to give the nurse instructions. The evidence shewed that blood poisoning may arise from natural causes, and it is just as reasonable that it did so here as from any cause assigned by the plaintiffs. There must be some specific cause of neglect proved. None of the witnesses could speak positively as to the cause of the trouble, and it was only a matter of conjecture, and where there is only conjecture there is no case for the jury. A surgeon is not an insurer, *i.e.*, does not guarantee success, but is only required to use ordinary skill. The evidence disclosed that the defendant was a practitioner of good standing,

and was skilled in the practice of his profession ; and that he exercised such skill here ; the mode of treatment he adopted being the one usually adopted by the profession. On behalf of the plaintiffs Dr. Whiteman insisted that a mode of treatment suggested by him should have been used, but the evidence failed to shew that such mode was in any way recognized by the profession, and had taken the place of the old recognized mode of treatment. They referred to, *Hancke v. Hooper*, 7 C. & P. 81, 84 ; *Rich v. Pierpoint*, 3 F. & F. 35, 40 ; *Wharton on Negligence*, sec. 736 ; *Storey v. Veach*, 22 C. P. 164, 176 ; *Jackson v. Hyde*, 28 U. C. R. 294 ; *Fields v. Rutherford*, 29 C. P. 117 ; *Perionowsky v. Freeman*, 4 F. & F. 977 ; *Potter v. Warner*, 91 Penn. 362 ; *Jackson v. Metropolitan R. W. Co.* 2 C. P. D. 125 ; *Avery v. Bowden*, 6 E. & B. 974.

Osler, Q. C., and *McGee* (of Oshawa), contra. The evidence disclosed that the delivery of the child was performed by the use of instruments, and that they were negligently used, and there were other grounds of negligence set up. As to these the jury have found against the plaintiffs ; but still the evidence on these points may be looked at to see whether any injustice has been done by the verdict on the whole case. As to the point on which the jury have found for plaintiffs, namely, the want of proper instructions, this was amply supported by the evidence. The evidence shewed that the so-called nurse was not in fact a nurse. She was the sister of the female plaintiff, and merely came to give her assistance and be with her sister during her confinement. She had no skill, of which the defendant was fully aware. The defendant should have clearly instructed her as to what was proper to be done.

Lount, Q. C., in reply. The evidence on the points on which the jury have found against the plaintiffs, cannot now be considered by the Court. If the plaintiffs desired to have the Court consider them, they should have moved against the findings.

September 11, 1886. CAMERON, C. J.—The jury have found the defendant guilty of negligence, and find the negligence to have been in being remiss in giving his instructions to the nurse, and in not seeing that his instructions were properly carried out.

It is not easy to see, having regard to the evidence, exactly what the jury meant by this answer. The defendant did give instructions, and, as far as given, they were fully carried out. The jury perhaps meant that the instructions were not precise or definite enough, but the word imports neglect and want of care and dilatoriness; and, if they meant defendant did not give instructions at all, one part of this finding is inconsistent with and contradictory of the other, unless it can be said the evidence discloses that some instructions were given by the defendant which were neglected and not carried out by the so-called nurse Mrs. Huff, and that there were other things in respect to which the defendant neglected to give instructions that he ought to have given.

This inconsistency, which consists in finding that the defendant did not give instructions, and then, that he did not see that the instructions he had never given were carried out, would not entitle the defendant to a judgment dismissing the action or awarding a nonsuit, but at most to a new trial, if there was evidence that ought to have been submitted to the jury in support of either branch of the finding.

To entitle the plaintiffs to succeed they must have made out, first, negligence or want of skill on the part of the defendant in his treatment of the female plaintiff; and secondly, that she was injured by such negligence or want of skill. If the evidence fails to make out both these essentials to be established by the plaintiffs the defendant is entitled to have his motion and order *nisi* made absolute.

The gravamen of the plaintiffs' complaint, as set forth in their statement of claim, was the negligent and unskilful use of the forceps. The finding of the jury must be taken

to have set aside that claim ; and the plaintiffs' right to recover, if at all, is confined to the alleged negligent and unskilful treatment of the female plaintiff after the delivery of the child. The improper treatment and negligence to which the evidence is applied are the not cleansing of the vagina sufficiently, the improper use of *veratrum viride*, and the application of poultices in such a way as to dam up and prevent the flowing away of the purulent discharges from the uterus, vagina, and lacerated perineum, and the neglect to make proper examinations of the person of the female plaintiff.

The evidence of the medical witness called by the plaintiffs establishes, I think beyond doubt, that she was suffering from puerperal fever or septicæmia ; and that evidence also discloses that septicæmia may arise in cases of childbirth where no instruments are used and without laceration of the cervix or the perineum, and, when once set up, it is very difficult to cure. Septicæmia may also arise from purulent or fetid matter passing over a raw and absorbing surface such as those caused in the female plaintiff by the laceration of the cervix and perineum. The evidence here wholly failed to shew that the laceration the female plaintiff suffered was caused by the use of the instruments by the defendant, and that the septicæmia which was set up was due or ascribable to such laceration.

The most that appeared was that it might arise from the laceration and the alleged neglect to cleanse the parts, not that it did, or that it was more likely to have arisen from the laceration of the cervix or perineum than from some cause for which the physician could not in any manner be responsible. If Dr. Warren was right in his opinion, septicæmia had set in without any default of the defendant ; and, assuming this, it cannot be said the female plaintiff's protracted and debilitating illness was attributable to want of skill or neglect on the part of the defendant.

The evidence establishes that the defendant is not deficient in skill. He is a practitioner of long standing with a very favorable reputation ; but his general qualification

would of course not protect him if he failed to use his skill and knowledge in this particular case. But I fail to see in his treatment of the female plaintiff any evidence of want of skill or neglect; and I cannot help thinking this action would never have been brought if the defendant had been disposed to listen with patience to Dr. Whiteman's representations of what may, without inaptness, be termed his heroic treatment by extensive irrigation. I am not prepared to express any opinion as to this treatment. In fact I feel myself quite unqualified upon the material before me to form any decided opinion about it. Though not an entirely new thing it was strange to Dr. Warren; and it cannot be said that it had received such general professional approval, that the neglect of a professional man to use it and abandon the older system could be deemed a failure on his part to avail himself of known and reasonable means of treatment resulting in injury to his patient. I think a reckless disregard of a new discovery, and an adhesion to a once approved but exploded or abandoned practice resulting in injury to a patient, would give a cause of action. But, on the other hand, no medical man can be bound to resort to any practice or remedy that has not had the test of experience to recommend it, and a physician or surgeon resorting to such new practice or remedy with injurious consequence following, would be more liable to an action than one who with like result followed the beaten track. Without experiment there would be no progress in medical or any other science. Still he who tries the experiment and thereby injures another must take the consequences.

In this particular case, the defendant assumed that the washing out of the vagina with a pint of water, and then the injection of the carbolic acid mixture, would be sufficient to prevent any ill consequence from the discharge; and the evidence does not shew that he was wrong; but, if he had been, the nurse Mrs. Huff, in addition to following the defendant's instructions, washed the parts, according to her evidence, four or five times a day, which, according to Dr. Warren, would have been sufficient to prevent ill effects from the

offensive discharges. And, with respect to intrusting Mrs. Huff with the duty, she was intrusted by Dr. Whiteman with the duty of applying his more drastic irrigation; and, while Mrs. Huff says the defendant did not instruct her in the way to apply the wash, she stated she knew how to do it, and there is no room for saying on the evidence there was any hurtful application of the water. As to the quantity used, that would seem to be a matter of judgment. Dr. Warren said he used an ordinary pitcher full. What is an ordinary pitcher? Pitchers of all sizes are in ordinary use; but his test and guide was the water running away clear, a sensible one if perfect cleansing was the object sought, and no other effect from the water. The defendant did not instruct the nurse she was to use the wash till the water ran clear, but merely that she was to syringe out the vagina, and apply the carbolic mixture; but it would be apparent to any one of intelligence the use of the water was to cleanse the parts, and if a pint was not sufficient to do so, the nurse would have called the defendant's attention in all probability to the fact.

But, whether it was or was not sufficient, the difficulty still remains in the plaintiffs' way: the evidence fails reasonably to shew that the protracted illness of the female plaintiff resulted from any neglect on the part of the defendant. The same observations apply to the use of the poultices, and the use of *veratrum viride* was, according to the evidence of Doctor Warren, not improper, though he himself preferred for the same purpose to use *aconite*. Where there are several drugs used to accomplish the same end, the medical man must be allowed to exercise his own judgment as to which he will adopt; and it can neither be attributed to want of skill or negligence should it fail to accomplish the object intended and result injuriously to the patient, unless there was something in the condition of the patient known to the medical man, or which, under the circumstances, he ought to have known to render the use of the selected drug improper.

I think to direct a nonsuit in this case is within the

spirit of the decision in *Fields v. Rutherford*, 29 C. P. 113, and the rule as to the duty of the Court laid down in *Metropolitan R. W. Co. v. Jackson*, 3 App. Cas. 193.

There was in this case no evidence from which it could be reasonably inferred that the illness and slow recovery of the female plaintiff was attributable to either want of skill, or want of care, or negligence on the part of the defendant.

In *Hancke v. Hooper*, 7 C. & P. 81, Tindal, C. J., in summing up told the jury the plaintiff must shew the injury was attributable to the defendant's want of skill—they were not to infer it. From which I understand, the plaintiffs' evidence must reasonably show the injury is chargeable to defendant; and it is not sufficient to shew it is possible it may be so, it must take the case out of the realm of conjecture, and place it within the bounds of reasonable certainty.

There must, therefore, be judgment for the defendant dismissing the plaintiffs' action, with costs.

The defendant has contended that it was no part of his duty to instruct the nurse as to the way in which his instructions should be followed.

I am not prepared to accept this contention as sound; and, if the case turned upon that, I should require further to consider the question; and my present view is, that where, in the nature of the case the doctor cannot perform the service himself, he is bound to give such instructions as will enable an ordinary person to follow his directions; and, if he failed to do so and injury resulted to the patient therefrom, he would be guilty of actionable negligence.

It may be remarked as somewhat curious that the jury have awarded no damages to the female plaintiff, who underwent all the suffering consequent upon her protracted illness, but gave damages to the male plaintiff, who experienced none of the physical pain. It may be that they did not give her damages because she did not desire the action to be brought, and confined the damages to what they deemed was her husband's actual pecuniary loss. In

any other view the verdict would seem to be inconsistent. But no complaint is made on this ground.

The defendant could not complain and the female plaintiff has not thought fit to do so.

Judgment accordingly.

GALT, and ROSE, JJ., concurred.

[COMMON PLEAS DIVISION.]

McEWEN V. DILLON.

Landlord and tenant—Breach of covenant by lessor—Damages—Measure of.

In an action by the plaintiff, the lessee of a certain farm, against the defendant, the lessor, for breach of the covenants contained in the lease, to dig ditches, &c.

Held, CAMERON. C. J., dissenting, that the measure of damages was the difference between the rentable value of the demised premises with the defendant's covenant performed, that is, with the improvements made, and the value without such improvements.

At the trial the learned Judge directed that if certain improvements were made, the damages were to be reduced thereby. On its being shewn to the Divisional Court that those improvements had substantially been made, the damages were reduced to \$200.

THIS was an action brought for breach of covenant contained in a lease whereby the defendant, who was the lessor, covenanted with the plaintiff, the lessee, to dig certain ditches, erect certain fences, and furnish material for the repair of the house.

The cause was tried before Armour, J., without a jury, at Ottawa, at the Spring Assizes of 1886.

There was no question as to the breach of covenant; and it was proved that in consequence the plaintiff had sustained damage.

At the close of the case the learned Judge gave judgment in favour of the plaintiff for the sum of \$600 damages, being the difference between the rentable value of the demised

premises with the covenants performed, that is, with the improvements made, and their rentable value without such improvements, with full costs of suit; and he directed that if the said covenants should be performed on or before the 15th day of May next, to the satisfaction of John O'Callaghan the said damages should be reduced to \$300.

In Easter sittings, *A. Cassels* moved on notice to set aside the judgment entered for the plaintiff, and for a new trial, on the ground that the judgment is contrary to law and evidence, and the weight of evidence; and on grounds disclosed in affidavits filed.

During the same sittings, *Cassels* supported the motion, and referred to *Holderness v. Lang*, 11 O. R. 1; *Hadley v. Baxendale*, 9 Ex. 341; *Atkinson v. Beard*, 11 C. P. 245; *Mayne on Damages*, 3rd ed., 237; *Erskine v. Adeane*, L. R. 8 Ch. 757, 761; *Sutton v. Temple*, 12 M. & W. 52; *Hart v. Windsor*, 12 M. & W. 68; *Grébert-Borgnis v. Nugent*, 15 Q. B. D. 85.

Mosgrove, contra, referred to *Marrin v. Graver*, 8 O. R. 39; *Prescott v. Otterslatter*, 79 Penn. 462; *Brown v. Foster*, 51 Penn. 165.

Allan Cassels, in reply, referred to *Nicklin v. Williams*, 10 Ex. 259; *Lamb v. Walker*, 3 Q. B. D. 389.

September 11, 1886. GALT, J.—There is no ground whatever for saying that the judgment is contrary to law or evidence. The only question is as to the damages.

Mr. Cassels cited several cases having reference to actions brought for injuries sustained in consequence of damage done by mining operations, particularly the case of *Lamb v. Walker*, 3 Q. B. D. 389, which has, however, been overruled in the Court of Appeal in the case of *Mitchell v. Darley Main Colliery Co.*, 52 L. T. N. S. 675.

The principle, however, on which these cases were decided, does not, in my opinion, apply to the present. This is an action for breach of a specific covenant, and not for damages which may or may not arise from any future act.

of the defendant; and it is a well established rule that damages resulting from one and the same cause of action must be assessed and recovered once and for all.

Here there was a specific breach which, according to the evidence, would justly entitle the plaintiff to recover substantial damages; but out of consideration to the defendant the learned Judge allowed him to make improvements on his own property in accordance with the terms of the lease; and, on his so doing, directed that the damages should be reduced to \$300.

From the affidavits produced it is shewn that certain of these improvements have been made; but they are not to the satisfaction of the person named; they are, however, of such a description that the amount of damage should be reduced.

I understood on the argument from Mr. Mosgrove that, although he claimed that the deduction made by the learned Judge should not be allowed, because the conditions had not been complied with, the defendant was entitled to some deduction owing to what he had done. In my opinion the judgment should be reduced to \$200.

As respects the costs of this motion, I think they should be borne by the defendant. Had the result depended on the evidence given at the trial, the motion would have been dismissed; but the deduction made now is in consequence of acts done by the defendant since the trial, and which were brought to the notice of the Court on affidavit. The motion made by the defendant, was not to reduce the damages, but to set aside the judgment, and in this he has failed.

The motion must be absolute to reduce the damages to \$200, the costs of the motion to be paid by the defendant.

ROSE, J.—After considering all the cases cited by Mr. Cassels, I cannot say that the learned Judge was in error in adopting the rule he did as to the measure of damages.

I do not think a rule can be laid down to govern all cases.

In some cases where as here the tenant enters into possession knowing that the repairs have not been made, and does not choose to make them, it may be fair to give him the difference between the rentable value of the premises with the repairs and without them.

In other cases such measure might not do justice, and the amount which the repairs would cost might be the fair sum ; and I can imagine a case where the actual loss incurred by reason of the non-repair, might be the measure.

However that may be, I think the plaintiff is entitled to have the rent reduced for the time the repairs remained unperformed.

It seemed to me on the argument, from statement of counsel, that the covenant has, since the trial, been substantially performed.

I agree, therefore, in reducing the amount of damages by the \$300 ; and as the tenant will have the enjoyment of his premises for the remaining year of his term, I think the damages may be further reduced by \$100, allowing him \$100 a year by way of abatement for the first two years of the term.

I am not at all certain this is not a very liberal allowance, and might be reduced were the case sent down for a new trial ; but as the costs would be heavy, I think we ought, if possible, to put an end to the litigation.

Under the circumstances, the defendant must pay all the costs.

CAMERON, C. J.—The measure of damages adopted by the learned Judge at the trial, in fixing the amount of the plaintiff's damages, was the difference between the rentable value of the demised premises with the defendants' covenants performed and improvements made, and their rentable value without such improvements.

At first sight that would seem to be a correct measure ; but on closer examination I am of opinion it will not be found to be so. The general rule as to the amount of damages is, that the party to a contract who has broken it

shall be compelled to make such compensation to the other contracting party, as far as money can make such compensation, as will put him in the position as nearly as may be that he would have been in if no breach of the contract had taken place, provided that the loss or damage is the natural consequence of the breach of contract, or is of the nature or kind that was in contemplation of the parties in making the contract.

In the present case, the use the plaintiff might make of the land would have much to do with the loss he would sustain by reason of the ditches not being dug or the fences erected. For the purpose of pasture the want of drainage would be of less detriment than it would for cereals or roots, and for some roots and cereals it would be less hurtful than for others. The plaintiff did not desire the place for the purpose of re-renting it. In fact he could not by the terms of the lease re-let without the consent in writing of the defendant. It must therefore be assumed that he took the lease with the object of using it in any and all ways that he could do so beneficially for farming purposes, and if any portion of it was rendered unfit by reason of the want of the ditches or fences, the plaintiff would be damnified in respect of the loss of the quantity so unfit; and I presume, in addition, such reasonable sum as a jury or a Judge might think just to compensate for having to use less land than he contemplated.

It may seem that this is in effect the same as saying that the difference between the rentable value of the land in the one condition and the other is the true measure; but it is in truth quite different. Land without fences and drains that were required might not rent for what the place was worth, and the difference in the rent might be more than sufficient to put the place in the condition covenanted for, and if the plaintiff had dug the ditches and made the fences he would have had the place in the condition he bargained for, and the expenditure, if made in putting it in that condition with a sum as compensation for any inconvenience resulting to him in putting it in that condition,

would be the plaintiff's actual loss and damage under the general rule.

It is laid down in *Mayne on Damages*, 3rd ed., p. 237, that covenants to repair on the part of the lessor present no distinction as to the amount of damages recoverable for breach thereof from covenants by the lessee. But in some cases the test of the amount of damages from want of repair by the tenant is the diminished value of the reversion: *Mills v. Guardians, &c., of East London Union*, L. R. 8 C. P. 79, wherein Keating, J., said, at p. 85: "I think the rule laid down in the more recent cases, viz., that the true measure of damages is the extent to which the lessors' reversion is damnified by the want of repair, is the sounder rule, notwithstanding the other rule has the sanction of the high authority of Lord Holt." The other rule referred to, as that approved by Lord Holt, is that the damages would be the cost of putting the premises in repair: *Vivian v. Champion*, 2 Lord Raym. 1125.

If the rule in *Mills v. Guardians, &c., of East London Union* be a correct rule, it can hardly be said that it would furnish a guide to the measure of damages for breach of a covenant to repair a building, the repairs to which might cost twice as much or more than the amount of rent, and yet the building might be of little or no use to the tenant. If the language of Keating, J., could be held to have regard to the injury caused to the reversion in reducing its annual value, it would apply as well to the case of the landlord as the tenant. But it does not seem to be so restricted. *Green v. Eales*, 2 Q. B. 225, is a case where the cost of making repairs was held to be the damages caused by the plaintiff's breach, and the plaintiff was held disentitled to rent and taxes paid for another house while the repairs were being made. In the present case the defendant's covenant was to dig the ditches and erect the fences before the first day of January, 1885, but the term was not to commence till the first day of March following. Therefore there was a breach of the plaintiff's covenant before the term began, and, according to authority, this would seem to give the plaintiff an immediate right of

action, and he would have the right to recover in that action the full damage he sustained. He would not be permitted to maintain several actions in respect of the breach of covenant committed: *Coward v. Gregory*, L. R. 2 C. P. 153.

It was, after the breach, competent to the plaintiff to have refused to enter on the land; and, had he done so and sued then, his damages could not reasonably have been the difference in the rental value of the premises with the covenant performed and unperformed, and yet he would have had a right of action for the breach.

It does not seem to me that his entry under the lease with knowledge of the breach can give him the right to such difference in value for the whole term.

Looking at the evidence I cannot say that I am satisfied with the opinion expressed by some of the witnesses that the premises were not worth as much by two hundred dollars a year in the condition they were in, as they would have been with the ditches dug or fences repaired. I am of opinion this is one of the cases in which no positive or definite rule for measuring the damages can be laid down, and while there is much seeming reason and fairness in the measure adopted by the learned Judge it does not do justice.

The plaintiff is entitled to more than nominal damages, but what the amount should be is to be gathered from all the surrounding circumstances. A jury, I think, would be better able to estimate them than a Judge from their better acquaintance with the subject.

The evidence given was, to my mind, of a very unsatisfactory character. Take, for example, the testimony of Martin Davy, who said the rental value in the condition the land is, was \$100 a year, and \$300 with improvements. He was unable to make any estimate of the quantity of the land injured by water, but said there was more than ten acres; and, on being asked if the plaintiff got the ten acres free what the rest of the land would be worth, he said he could not say. The evidence of the other witnesses was also indefinite and unsatisfactory.

I do not think the present judgment does justice, and that it will be better to submit it to a jury, than to attempt to decide upon the evidence now taken, especially as the work has since been done, and it is disputed that it has been properly done.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

MCLAUCHLIN V. THE GRAND TRUNK RAILWAY COMPANY.

Railways—Overhead bridge—Accident—Liability—Contributory negligence.

Action to recover damages for injuries sustained by the plaintiff by reason of an overhead bridge being less than seven feet above the top of the defendants' car. At the time of the accident the defendants were operating the Midland Railway under an agreement made 22nd September, 1883, whereby it was agreed that the defendants should take over all the lines of the Midland Railway Company, buildings, rolling stock, stores and materials of all kinds, and should during the continuance of the agreement well and efficiently work the said lines and keep and maintain them with all the works of the Midland Railway in as good repair as they were when so taken over. The agreement was to be in force for twenty-eight years. The Midland Railway Company, though incorporated under 44 Vict. ch. 67, (O.), was brought under the control of the Parliament of Canada, and made a Dominion Railway, by 46 Vict. ch. 24, (D.), passed in 1883, before the agreement was made. By the Act of 1881, 44 Vict. ch. 24, sec. 3 (D.), amending the Consolidated Railway Act of 1879: every bridge or other erection or structure under which any railway passes, &c., existing at the time of the passing of the Act, of which the lower beams were not of sufficient height from the surface of the rails to admit of an open and clear headway of at least seven feet, shall be re-constructed or altered within twelve months from the passing of the Act, so as to admit of such open and clear headway of at least seven feet, at the cost of the company, municipality, or other owner thereof, as the case may be, &c.

By 44 Vic. ch. 22 (O.), passed when the Midland Railway was under the legislative authority of the Province of Ontario, that railway was required to re-construct bridges owned by the company within 12 months from the passing of the Act in terms identical with the Dominion Act except that the former Act makes every railway liable to its servants for any neglect &c.

Held, GALT, J., dissenting, that the defendants were not liable for the injury sustained by the plaintiff.

The plaintiff was necessarily on the top of the car in the performance of his duty. There was no evidence to shew that he knew, at the time of the accident, that he was near the bridge, the night being dark; and it was a matter of doubt whether he even knew that the bridge was too low. The bell rope was not connected before the train left the station, but this did not appear to have been through any neglect of his, and, for all that appeared, the train might not have been completed until just before starting, and until the engine was attached no connection could be made.

Held, that the plaintiff could not be deemed guilty of contributory negligence.

THIS was an action brought to recover damages sustained by the plaintiff by reason of a bridge across the line of the Midland Railway, being less than seven feet above the top of the freight car on which the plaintiff was employed while in the service of the defendants.

The cause was tried before Armour, J., and a jury, at Lindsay, at the Spring Assizes of 1886.

At the close of the case the learned Judge said: "I will rule *prima facie* that the railway company are liable under this statute in order that the case may not come down again; the Court can deal with that question. I will give leave to either party to produce proofs of the arrangement with the Midland."

The jury found a verdict in favor of the plaintiff, with \$500 damages.

In Easter Sittings, Osler, Q.C., obtained an order *nisi* to set aside the verdict entered for the plaintiff and for a new trial, or to enter judgment for the defendants, on the grounds: 1. That there was evidence of contributory negligence on the part of the plaintiff; 2. That there was no statutory duty upon the defendants carrying traffic on the line of the Midland Railway of Canada to alter the height of the bridge in question.

During the same sittings, May 27, 1886, Osler, Q. C., supported the order, and referred to *Vogel v. Grand Trunk R. W. Co.*, 2 O. R. 107; *Clegg v. Grand Trunk R. W. Co.*, 10 O. R. 708; *Gibson v. Midland R. W. Co.*, 2 O. R. 658.

Barron, contra, referred to *Darling v. Midland R. W. Co.*, 11 P. R. 32; *Lister v. Lobley*, 7 A. & E. 124; *Lewis v. Arnold*, L. R. 10 Q. B. 245; *Dawson v. Midland R. W. Co.*, L. R. 8 Ex. 8; *Caudwell v. Hanson*, L. R. 7 Q. B. 55; *Plumstead Board of Works v. British Land Co.*, L. R. 10 Q. B. 16; *Hughes v. Sutherland*, 7 Q. B. D. 160; *Hopkins v. Provincial Ins. Co.*, 18 C. P. 74; *Gilchrist v. Tobin*, 7 C. P. 141; *McEwen v. Boulton*, 2 Ch. Chamb. 399.

September 11, 1886. GALT, J.—There was no dispute as to the facts. The bridge was not of the required height, and the plaintiff was seriously injured.

It was urged at the trial, and also before us, that the plaintiff was guilty of contributory negligence; but this was negatived by the jury; and, speaking for myself, I should say, was in no case available when it is shewn that the express provisions of the statute 42 Vic. ch. 9, sec. 15 (D.) have been disregarded by the company. Such provision in its nature must have been intended for the protection of the servants of the company as a class; and, as it expressly declares what the height of the bridge shall be, it appears to me it is no defence for the company to say; "it is true the bridge is not so high as the law requires, but you were aware of that fact, and therefore cannot recover."

I have already expressed my opinion that in a case like the present the question of contributory negligence does not arise. But, even if I am in error in stating the position so broadly, I do not think in the present case such a defence would exist. The plaintiff, in discharge of his duty, was obliged to be on the top of the car for the purpose of connecting the engine with the rear car of the train. It was in the evening, and while he was on the top of the car he was struck against the bridge. The accident could not have occurred had the bridge been of the prescribed height, and the only negligence of which the plaintiff can be accused is, that the line had not been connected before the train left the station, but it is not shewn that this was owing to any neglect on his part; the train may not have been completed until just before starting, and it is manifest that, until after the engine had been attached to the train, no connection could have been made.

As to the second objection.

At the trial it was urged the defendants were not liable, because they were not the owners of the road, and that the Midland Railway were the only parties responsible. The defendants were not prepared at the trial to prove the agreement, but it has since been furnished under the leave given by the learned Judge at the trial.

By that agreement, which was made on the 22nd September, 1883, it was agreed, "that the Grand Trunk shall take over all the lines of the Midland Railway, buildings, rolling stock, stores, and materials of all kinds; and shall, during the continuance of this agreement, well and efficiently work the said lines, and keep and maintain them with all the works of the Midland in as good repair as they are when taken over."

The agreement was to be in force for a period of twenty-eight years.

Under this agreement the Grand Trunk Railway Company have the absolute control of all the affairs of the Midland Railway Company, and the whole amount payable to the company as a company, is "the payment of a sum not exceeding two hundred pounds sterling per annum for the maintenance of the corporate organization of the said Midland Railway."

The Midland Railway Company, though incorporated under the Statute of Ontario, 44 Vic. ch. 67, was brought under the control of the Dominion Legislature by 46 Vic. ch. 24 (D.), which was passed in May, 1883, before the agreement was executed. It comes, therefore, under the legislative authority of the Parliament of Canada.

By the Act of 1881, (amending the Consolidated Railway Act,) 44 Vic. ch. 24, sec. 3 (D.): "Every bridge or other erection or structure," &c., "under which any railway * * passes, existing at the time of the passing of this Act, of which the lower beams * * are not of a sufficient height from the surface of the rails to admit of an open and clear headway of at least seven feet, * * shall * * be reconstructed or altered within twelve months from the passing of the Act, so as to admit of such open and clear headway of at least seven feet. * * Such bridges shall be reconstructed or altered at the cost of the company, municipality or other owner thereof as the case may be."

It was urged by Mr. Osler that the defendants are not the owners, and consequently no duty was cast upon them.

It appears to me impossible to frame an agreement in

more general terms than that between the Midland Company and the Grand Trunk, short of an absolute transfer of the lines of railway. The Grand Trunk "shall take over all the lines of the Midland Railway, buildings, rolling stock, stores, and utensils of all kinds," and shall, during the continuance of this agreement, well and efficiently work the said lines, and keep and maintain them, with all the works of the Midland, in as good repair as they are when so taken over." Then follows an agreement by which the Grand Trunk become the actual proprietors of the stores, or "that the Grand Trunk shall have the right to use the said stores, material and fuel in the working and maintaining of the Midland Company's line, and that at the end of this agreement the Grand Trunk will return stores of the equal value to those to be handed over to them, or will in cash, at their option, pay the value of the stores so handed over."

The agreement was to remain in force twenty-eight years. The Grand Trunk had the exclusive right of running the said line, and of course to receive the earnings. They also undertake "the working expenses of the Midland as defined and fixed by section 5 of the Act of Ontario, 45 Vic .ch. 67." On referring to that section we find the expression "working expenses," shall be taken and held to mean "all expenses of maintenance and renewal of the railway, and of the stations, buildings, works, and conveniences belonging thereto."

As respects the meaning of the word "owner," Lord Denman, in the case of *Lister v. Lobley*, 7 A. & E. 124 at p 127, says: "As to the first point, it appeared to me at the trial, and it does so most clearly now, that the plaintiff was 'an owner or proprietor' for the purpose of receiving satisfaction. The words have no definite legal meaning." All the learned Judges concurred in this construction.

That was a case similar in one respect to the present, viz., the person claiming as "owner," was a lessee, and was not the owner in fee; but it was held that he might fairly and properly be considered as the "owner."

In the present case the Grand Trunk Company are

really the absolute owners of all the property of the Midland Company for the period of twenty-eight years; they are the only parties possessed of the means to make the necessary repairs and alterations on the line of The Midland Railway; and it appears to me they are liable for any injury sustained in consequence of, or neglect of, duty imposed on the Midland by any Act of the Legislature.

This order *nisi* should be discharged.

CAMERON, C. J.—The plaintiff, was at the time of receiving the injury of which he complains, a brakesman in the employment of the defendants, and he cannot recover for such injury unless he can bring both himself and the defendants within the provisions contained in the 15th sec. of the Railway Clauses Consolidation Act, 1879, subsec. 5, as amended by 44 Vic. ch. 24, sec. 3, or the Act of the Legislature of Ontario, 44 Vic. ch. 22.

At the time of the injury to the plaintiff, the defendants were operating the Midland Railway of Canada, under an agreement entered into between the two companies under their respective corporate seals in such manner as to be valid and binding upon both companies, and bearing date the 22nd day of September, 1883, whereby it is provided (5) that the Grand Trunk shall take over all the lines of the Midland Railway, buildings, rolling stock stores, and materials of all kinds, and shall during the continuance of this agreement well and efficiently work the said lines, and keep and maintain them with all the works of the Midland in as good repair as they are when so taken over; (9) that the agreement shall go into effect on and from the first day of January, 1884, and continue in force for a period of twenty-eight years.

The effect of this agreement is to make the defendants lessees of the Midland Railway for twenty-eight years, without any right of defeasance or forfeiture in the meantime by the Midland Railway Company.

I do not think the defendants can be treated as having any larger rights in respect to the railway, lands

and rolling stock than a lessee would have, and the obligations assumed by the defendants are those expressly provided for by the agreement. The defendants as between them and the Midland Railway Company have no liabilities resulting from the contract other than those expressly provided for.

The first question then is, assuming the Midland Railway to be a railway under the legislative jurisdiction of the Dominion Parliament,—and this the Court is bound to assume by reason of its decision in *Clegg v. Grand Trunk R. W. Co.*, 10 O.R. 708,—are the defendants bound to alter the overhead bridges crossing the Midland, as required by the said amended subsection 5 of section 15 of the Consolidated Railway Act of the Dominion, 1879, and liable for the omission to alter such bridges?

By section 4 of the said Act, 44 Vic. ch. 24, (D.), the said subsection 5 is declared to apply to every railway and railway company subject to the legislative authority of the Parliament of Canada. But the consequences of a neglect to make the bridges on any railway to comply with the requirements of the said fifth subsection, are not expressly stated, except in so far as subsection 4 of section 27 may be held to apply to this particular neglect. This subsection 4 declares any contravention of this Act, or of the special Act by the company, or by any other party for which no punishment or penalty is herein provided, shall be a misdemeanor, and shall be punished accordingly.

There is nothing in the Consolidated Railway Act to shew the object of the 5th subsection of section 15. We may conjecture that it was for the protection of servants of railway companies whose duties require them at times to be on the top of cars, and are endangered by bridges too low to permit a man standing upright on such cars to pass under. But we are not at liberty to say so, and attach a liability not provided for by their Act of incorporation, or the Consolidated Railway Act, to such companies, that would not attach to them at common law.

This plaintiff would not, in the absence of this enactment,

have any remedy against the defendants at common law, and he cannot, under the statute, have any remedy other than the statute provides. I am, therefore, reluctantly forced to the opinion that the plaintiff is not, as far as this action is concerned, in a position to derive any benefit from the said 5th subsection.

The said 5th sub-section, as far as necessary to be considered in this case, provides: "Every bridge or other erection or structure over, or through, or under which any railway to which this Act applies, passes, and every tunnel through which any such railway passes, existing at the time of the passing of this Act, of which the lower beams, members, or portions of that part of such bridge, erection, structure or tunnel which is over the railway, are not of a sufficient height from the surface of the rails to admit of an open and clear headway of at least seven feet between the top of the highest freight cars used on the railway and the bottom of such lower beams, members, or portions, shall, with suitable approaches thereto, where necessary, be reconstructed or altered within twelve months from the passing of this Act, so as to admit of an open and clear headway of at least seven feet between the top of the highest freight cars used on the railway and the bottom of such lower beams, member, or portions, and shall at all times thereafter be so maintained as to admit of such open and clear headway of at least seven feet. Such bridges or other erections, structures or tunnels, shall be reconstructed or altered at the cost of the company, municipality, or other owner thereof as the case may be."

On whom does this sub-section impose the obligation of making the alteration or reconstruction of bridges? It is to be done at the expense of the company, municipality, or other owner of the bridge, as the case may be; and, it may be fairly argued, where the expense falls there the obligation lies. No argument was addressed to us on the point; and, if it were necessary to decide it for the purposes of this action, it would present a question by no means easy of solution; but it will not be necessary to decide it if the

present defendants cannot in any view of it be held to have imposed upon them the obligation.

The company referred to in the section must be held to be the company owning the railway, and not a lessee or company working the railway under a mere traffic arrangement. The Act containing the above amended 5th sub-section was passed on the 21st day of March, 1881. At that time the Midland Railway Company, as far as the evidence discloses, was working and controlling its own lines. So that when the agreement now in evidence between that company and the defendants was entered into, the year allowed for the alteration or reconstruction of the bridges had elapsed.

The defendants could not be indicted for the neglect as the offence had been committed before their connection with the Midland; and it is difficult to see how they assumed any liability in respect of this particular neglect by entering into the agreement under which it is sought to fasten liability upon them. If liable to this plaintiff by reason of the agreement, they would be equally liable if in the ordinary course of traffic they had run only one freight train on the Midland and the accident happened. The liability would have to attach from the use of the Midland Railway Company's track, not from any obligation resting upon the defendants under the agreement to reconstruct. The defendants' contract is, to keep in repair, not to alter or reconstruct that which does not need repair.

The 10th clause of the contract provides that the Midland shall settle and adjust all accounts of that company up to the 31st of December, 1883, and shall protect and save harmless the defendants from all such claims. The expression "accounts," could hardly be held to cover an obligation to build or alter or reconstruct a bridge. But the provision would seem to shew that, as far as the two companies were concerned, the Midland was to discharge all its obligations not expressly assumed by the defendants by the agreement.

At the time the agreement was entered into, the Midland

was not under the legislative control of the Ontario Legislature. It passed out of such control by the Act under consideration in *Clegg v. Grand Trunk R. W. Co.*, 46 Vic. ch. 24, sec. 6, which was passed on the 25th May, 1883.

By the Ontario Act 44 Vic. ch. 22, passed on the 4th March, 1881, the Midland Railway Company, then being a company within the legislative authority of the Legislature of Ontario, was required to reconstruct bridges owned by the company within twelve months from the passing of that Act, in terms identical with sub-sec. 15, as that sub-section appeared in the Consolidated Railway Act of 1879. But the Ontario Act by section 7, expressly makes every railway to be liable for its obligations, including those to servants who may suffer injuries from any neglect on the part of the company in respect of the matters in the fifth sub-section required to be observed or performed by the company before the agreement.

These defendants under the Ontario Act, in consequence of their agreement with the Midland Railway Company, would be liable to the plaintiff, for the liability attaches to a railway company working or operating the railway as well as to the owner of the railway whereon the injury may happen. But the servant has not an absolute right to recover irrespective of the question whether by his own conduct he contributed to the injury to himself. He is merely given the same right to compensation that a stranger would have.

The provision in this respect of the Ontario Act corresponds with the provision of the Imperial Employers' Liability Act, 1880, under which Act in the recent case of *Weblin v. Ballard*, 17 Q. B. D. 122, it was held the defence of contributory negligence was open to the employer.

But that case is also, I think, an answer to the objection here raised by the defendants, that the plaintiff was guilty of contributory negligence, as that question has been found by the jury against the defendants. It could only be contributory negligence on the part of the plaintiff, his

going upon the top of the car to perform a duty that he ought to have performed before, if he knew that the bridge was too low to permit him to pass under in safety. It was a matter of doubt whether he knew or not; and the jury might have found on the evidence that he did not know the condition of the bridge, but knowledge alone would not constitute his going on the top of the car a contributory act of negligence.

In the case of *Weblin v. Ballard*, A. L. Smith, J., stated his opinion on this point, at p. 127, thus: "The mere fact that the work was manifestly dangerous of itself does not constitute contributory negligence. If it had been shewn that the deceased had used that which was dangerous in a negligent manner, that would have been contributory negligence."

To bring the plaintiff within this decision there should have been evidence that he knew he was in the neighbourhood of the bridge when he went on the cars, in which case his remaining in an upright position, the night being dark, would probably constitute negligence. There was no negligence in going upon the top of the car to perform work that could only be performed when on top at the time it was performed, or the performance of which would be rendered more easy and convenient in that position if there had been no overhead bridges near. Such bridges may in some localities be very near together, in others they may be far from each other. And it is difficult to see how a brakesman on a freight train, on duty on a dark night, is to determine his exact locality, or his proximity to or remoteness from an overhead bridge.

The plaintiff, I think, is not entitled to succeed unless the defendants were bound under the Dominion Act to make the alteration in the bridge necessary to make it conform to the requirements of the said amended 5th subsec. of sec. 15 of the Consolidated Railway Act of 1879; and that Act gives a personal right of action, and not merely makes the neglect to comply with its requirements a criminal offence.

I have already expressed my opinion on the first point ; and I think the defendants are entitled to succeed on the second also.

The plaintiff, as far as personal remedy is concerned, is in the same position as other persons, and has no special right conferred upon him by the said fifth sub-section.

The Ontario Act has been held by the Court of Appeal, in *Monkhouse v. Grand Trunk R. W. Co.*, 8 A. R. 637, not to apply to these defendants. The Midland by the Ontario Act would apparently be liable to this plaintiff ; but I do not assume to decide upon that in the absence of that company, and only venture to say that *prima facie*, that company comes within the express language of the Act.

The plaintiff's verdict must be set aside, and judgment for the defendants dismissing the plaintiff's action entered, with costs.

ROSE, J.—Mr. Barron claims that the defendants are liable under the Dominion Act 42 Vic. ch. 9, sec. 15, sub-sec. 5 (1879), amended by 44 Vic. ch. 24, sec. 3 (1881). At the date of passing either Act the defendant company had nothing to do with the line, and had no duty imposed upon it with respect to the bridge in question, nor did these Acts apply to the Midland Railway Company.

By 44 Vic. ch. 22 (O), by a similar provision, such duty was cast upon the Midland, if indeed the section can be construed so as to impose the duty upon a railway company at all.

The section, as also the section of the Dominion Act, directs the alteration of the existing bridges by and "at the cost of the" railway "company, municipality, or other owner thereof," within twelve months from the passing of the Act—4th March, 1881.

By the same section, in case the railway company use higher freight cars than at the time of the passing of the Act or reconstruction of the bridge, the company is directed to raise the bridge "after having first obtained the consent of the municipality, or of the owners of the bridge."

Unless therefore the railway company was the owner of the bridge at the time of the passing of the Act, the duty of raising it was not, as it seems to me, imposed upon the company.

Apart from such question, I do not see how the defendants became liable, for not only was it not owner when the Act was passed, but, if it became owner, it was not until the year expired as pointed out by the learned Chief Justice.

I am also of the opinion with the learned Chief Justice, that the defendant company did not become owner of the road by the agreement referred to; and no evidence having been given to shew it to have been either owner of the bridge or road, no cause of action has been shewn.

As has been pointed out the Midland Railway Company became a Dominion road in 1883; but I do not see how that can affect the question.

I agree the motion must be allowed, with costs.

Motion allowed.

[COMMON PLEAS DIVISION.]

MCLELLAN V. WINSTON ET AL.

Contract—Readiness and willingness to perform—Breach—Evidence.

In order to recover in an action for non-performance of a contract to do work, the plaintiff must shew a willingness and readiness on his part to perform, and on the defendant's part a distinct and unequivocal absolute refusal, and that such refusal was treated and acted upon by the plaintiff; for, if after refusal, he continue to urge or demand compliance with the contract, he must be deemed as considering it as not at an end.

In this case the plaintiff set up a contract made with defendants, to cut and lay down on the defendants' limits a quantity of ties; that he was to ship his outfit to Port Arthur, where he was to receive instructions from defendants as to the means and way of forwarding same to the place where the work was to be performed. The plaintiff sent his outfit to Port Arthur, and claimed that defendants neglected and refused to give such instructions and refused to carry out the contract whereby the plaintiff was damnified.

Held, that the evidence disclosed that the plaintiff himself was not ready and willing to perform the contract; and further, if a refusal to perform by defendants was proved, that it was not treated and acted upon by plaintiff as such, but thereafter he continued to treat the contract as still subsisting.

Held, therefore, the action failed.

The statement of claim, alleged that the plaintiff contracted with the defendants to cut and lay down 25,000 railway ties at 24 cents per tie on the defendants' limit, and to be delivered on such limit. After the making of the contract the plaintiff procured an outfit to enable him to carry out the contract, and the plaintiff was put to loss of time and expense in procuring such outfit; that the defendants refused to carry out the contract, whereby the plaintiff sustained damage.

At the trial the following amendment was made: "And it was further agreed that the plaintiff should ship the outfit necessary for the performance of said work to Port Arthur, to the care of John Ross, and that on arrival of the same at Port Arthur, he, the plaintiff, should report or apply to the defendant, McRae, who was by the same agreement to give the plaintiff instructions as to the means and way of forwarding his said outfit to the place where

the said ties were to be cut and delivered, for which the defendants were to obtain for the plaintiff reduced rates of transport. And the plaintiff did ship his outfit as agreed, and did, on arrival of the same at Port Arthur, report and apply to the defendant McRae as agreed upon, yet the defendant McRae, and the defendant Winston also, refused and neglected to give such instructions," &c.

Statement of defence to the original statement of claim.

1. The defendants deny they ever entered into any contract with the plaintiff as alleged.

2. They claim the benefit of the Statute of Frauds.

3. In reply to the seventh paragraph of the plaintiff's statement of claim, that the said plaintiff never presented himself at the defendants' works to fulfil any contract whatever; and that they never in any way prevented the plaintiff from so doing.

To the amended statement of claim they pleaded: And the defendants further say, that the defendant McRae did instruct the plaintiff's agent, in charge of his outfit, to proceed by boat to the works of the defendants, and the plaintiff's said agent agreed to proceed there, but afterwards refused to do so, and did not go there. The defendants further say the plaintiff's outfit reached Port Arthur so late in the season it would have been impossible to have forwarded the same at all to the said works until May following.

The cause was tried before Cameron, C. J., and a jury, at Port Arthur, at the Summer Assizes of 1885.

At the conclusion of the case the learned Chief Justice submitted several questions to the jury, none of them were answered; and, as they could not agree, they were discharged.

In Michaelmas sittings, *W. R. Meredith*, Q.C., moved on notice to enter a nonsuit (1), Because there was no sufficient note or memorandum in writing sufficient to satisfy the Statute of Frauds. (2) The plaintiff sought to recover upon an alleged repudiation of the alleged contract, but

there was no such repudiation proved, and that the plaintiff could not recover in the absence of such repudiation, or without shewing that he had performed the said alleged contract on his part; that it was his duty to have gone to the said place and there offered to perform it. That if there had been a repudiation of the said alleged contract, the plaintiff's telegram of the 22nd December, was a waiver of it.

During Easter Sittings, February 9, 1886, *W. R. Meredith*, Q. C., supported the motion. Under Rule 321 the Court can enter a nonsuit or judgment for the defendant: *MacLennan's O. J. Act*, 2nd ed., p. 435. *Stewart v. Rounds*, 7 A. R. 515; *Brewster v. Durrand*, W. N. 1880, p. 27; *Perkins v. Dangerfield*, 51 L. T. N. S. 535. It is particularly desirable that the Court should do so in this case, as there have been already two trials; and, at the last trial the jury failed to agree. There was no contract proved; at all events it was not sufficient to satisfy the Statute of Frauds. Assuming that a contract was proved, the plaintiff should have shewn a readiness and willingness on his part to perform the contract, and a refusal by the defendants to do so. The plaintiff contended that the telegram alleged to have been received from the defendants constituted a refusal to perform, or a repudiation by the defendants, of the contract; but the plaintiff never treated such telegram as a refusal or repudiation by defendants, and the contract as being at an end, for his own evidence shews that he deemed the contract to be still subsisting, and his claim was for damages for non-performance. Moreover, his telegram in reply showed he waived the alleged repudiation, and assented to a continuance of the contract: *Danube and Black Sea R. W. &c., Co. v. Xenos*, 11 C. B. N. S. 152, 13 C. B. N. S. 825; *Campbell v. Hill*, 22 C. P. 526; *Wright v. Skinner*, 17 C. P. 317; *Phillpotts v. Evans*, 5 M. & W. 475.

Schoff, contra. The Court will not interfere with the finding of the jury by taking the case out of their hands,

and entering judgment themselves; and it must be remembered that at the first trial the jury found for the plaintiff; and to a very great extent the order for a new trial proceeded on the ground of excessive damages. The whole question was one of disputed facts. There was clearly evidence to be submitted to the jury. The argument of the other side on the evidence might very properly be addressed to the jury, but is not a matter for the Court to determine upon.

September 11, 1886. GALT, J.—Mr. Meredith's first objection was, that there was no proof of any contract; and, speaking for myself, I am strongly of that opinion; but, as was contended by Mr. Schoff, this being a case of conflict of evidence, the plaintiff asserting there was a contract, and the defendant denying it, it is a question for the jury. To this we agree.

As to the agreement being within the Statute of Frauds, I do not express an opinion on that question, as it was not insisted on.

The other objections are to be considered.

In treating of them, I assume, for the sake of argument, that the plaintiff believed there was a contract; and the questions before us are, did he act in such a manner as, supposing there was a contract such as contended for by him, he is entitled to recover.

The following are extracts from the evidence of the plaintiff, and his witnesses, bearing on this point.

The plaintiff stated: "The contract was made on 17th November, 1883." Q. You made a contract to cut 25,000 ties for Winston & McRae, and you had introduced your foreman to them; he was to go down, when? A. Right away. Q. Down where? A. Down to Winton's work. Q. Where is that? A. Down on the north shore."

The evidence of the foreman, whose name is Barker, may, for convenience sake, be introduced here. "Q. Do you know the defendant; do you know Mr. Winston? A. I have seen the man once. Q. Do you know Mr. McRae?

A. I just know him by sight, that is all." There are then some questions and answers as to his conversation with McLellan, and as to his duties. He is then asked: "When were you to go? A. I was to go down on a boat with Mr. Winston, but there was some misunderstanding, and I did not get away. Q. How did it occur, the misunderstanding? A. Well, I was told to go on the "Tecumseh;" that she started on Sunday, and it seems that was the wrong boat. Q. And did you discover it in time? A. No, I could not get ready in time."

This was the man who, according to the plaintiff's evidence, was to be his foreman, and to proceed at once to the work, and he never did anything, or made any attempt to proceed to the work.

To recur now to the plaintiff's evidence.

After stating he had engaged a person named Pretty to be his financial foreman, as distinguished from Barker, who was to be employed in the woods, he is asked: "Did you give any instructions as to what he was to do when he got to Port Arthur? A. Yes, sir. Q. What? A. I instructed him to go to Mr. McRae's office, and he would direct him the route to go down. Q. Why did you instruct Pretty to go to McRae's office? A. Because Mr. Winston instructed me to get my instructions about route there, and when I could not go down myself I instructed Mr. Pretty to go there for instructions. Q. Where did you go after making your arrangement with Mr. Pretty? A. I went out west."

This is the whole of the plaintiff's own evidence, which, in my opinion, bears on the inception of the contract, so far as the question I am now considering is concerned.

Pretty was examined. I do not refer to those portions of his evidence bearing on the question of outfit, &c., but to those having reference to the manner in which he acted towards the defendants as expressing a readiness and desire to fulfil the contract, if any such existed. "Q. When did you leave Winnipeg? A. I left on Monday evening, the 24th, as near as I can get it. Q. Did you afterwards see

McRae ? A. Yes sir. Q. When did you see him ?” (McRae had been absent when witness first arrived.) “A. As soon as he got to Port Arthur. Q. When was that, about when ? A. It would be the second or third of December. Q. What took place between you ? A. I told him who I was, and what I was doing, and that I wanted to get down on the line, and he did not appear to know any thing about it,—Mr. McRae did not know any thing about it. Q. Did you tell him for whom you were there ? A. Yes, I told him I was there on account of McLellan. Q. For what ? A. To go down on the line, and take out those ties. Q. And he said what ? A. He said he did not know any thing at all about it, but he would wire Winston. Q. When McRae came he told you he knew nothing about it ? A. No, he said he knew nothing about it. Q. What was the state of navigation when you arrived with the outfit ? A. How do you mean ? Q. Was navigation open ? A. Yes, sir, oh yes, it was open, a big outfit of vessels, and stuff got shipped after I got there. Q. Were you in time to get your outfit shipped in time for navigation ? A. I was.”

The witness then states : “ He said the best thing I could do myself was to go down myself and see what Winston meant when he was not answering any of us at all. Q. Did you do that ? A. I was going, I went so far as to go to the dock, and Mr. McRae gave me a pass to go down with the “ Mount Clements.” Q. Why did not you go ? A. Well, I thought I would wait to see why Mr. Winston did not answer the telegram.”

He then states McRae afterwards showed him a telegram, and read it to him. It is denied on the part of the defendants that such a telegram was ever sent. The telegram, according to the *recollection* of the witness, was as follows : “ Don’t want McLellan’s outfit ; have few ties on line ; will take them out myself. Paton wanted 25 cents more a yard than what we were getting ; send me \$5,000 to pay up roll.” This must have been about the 5th or 6th December ; and on 6th December witness made a contract with a person of the name of Marks respecting some saw logs, and had nothing more to do with the defendants.

As regards the plaintiff, himself, he went to the west, as already stated, the day Pretty left for Port Arthur, and did not go to Port Arthur until the 22nd December. On his arrival he, on 22nd December, telegraphed to the defendant Winston as follows: "Shipped outfit according to promise; will hold you to tie contract at price as made." He never enquired for an answer; and on his cross-examination admitted as follows: "Q. Mr. Pretty was to see to the freight transport arrangements when he got to Port Arthur; when he got to Port Arthur he was to see about transport to go down to the work to see Mr. Winston; he should have gone? A. Yes. Q. Now then, when you came on the 17th, or 18th, or 20th December, did you intend, if Winston had said yes, to have gone on with the contract? A. Well I did not entirely. Q. And you would not have gone on with the contract then? A. No Sir, I would have been very foolish to do so, you bet your life I would not, not at the same figures. Q. Did you expect to get an answer from Winston to that telegram? A. I did Sir. Q. How many days did you remain in Port Arthur? A. I remained until the 26th. Q. You must have been here nearly a week? A. Yes. Q. Did you go to the telegraph office to enquire whether there was an answer to your message? A. No Sir. Q. Why did you not go there? A. Because I expected them to send to the hotel; I never go for telegrams; they are always sent; they knew where I was staying."

I have already stated that, in my own opinion, there was no contract; but, after the evidence above quoted, I incline strongly to think that if there was a contract, the breach was on the part of the plaintiff, and not on that of the defendants.

According to plaintiff's evidence, Barker was to have proceeded at once to the work; he did not do so. Pretty was also to have proceeded to the work; he was offered a pass by McRae, and would not go; and as to the plaintiff himself, he made the contract on the 17th November; he left Port Arthur the same day, or the next, and did not

return until about the 20th December. On the 22nd December he telegraphed to Mr. Winston that he would hold him to the contract, having made up his own mind that he would not carry it out.

Under these circumstances I think the rule should be made absolute, dismissing the action with costs, on the ground that the plaintiff and his agents neglected and refused to avail themselves of the offer of the defendants enabling them to proceed to the work; and when the plaintiff returned to Port Arthur from the west, he had made up his mind not to proceed with the contract.

ROSE, J.—In order to entitle the plaintiffs to succeed, he must shew a willingness and readiness on his part to perform, and on the part of the defendants “a distinct and unequivocal, absolute refusal,” and that such refusal was treated and acted upon as such by him; for, if he, after refusal, “continue to urge or demand compliance with the contract, it is plain that he does not understand it to be at an end:” *Benjamin* on Sales, 4 Am., 3rd Eng. ed., s. 860; *Cutter v. Powell*, 2 Sm. L. C. 8th ed., 1; *Avery v. Bowden*, 5 E. & B. 714, 6 E. & B. 953; *Reid v. Hoskins*, 5 E. & B. 729, 6 E. & B. 953. Also, the case cited by Mr. Meredith, of *Danube, &c., R. W. Co. v. Xenos*, 11 C. B. N. S. 152, especially at pp. 174, 176, 178.

On the plaintiff's evidence, which alone we consider on this motion, and assuming a contract proven, it may be that a refusal is shewn by the telegram alleged to have been sent by Winston to McRae and shewn to Pretty. The words “have few ties on line, will take them out myself,” might warrant a jury in finding a refusal on the part of the defendants to allow the plaintiff to take out the ties.

Assuming this, then, was such refusal treated and acted upon as such by the plaintiff?

I think not. When he telegraphed to Winston on the 22nd of December, 1883: “Shipped outfit according to

promise; will hold you for the contract at price as made," it seems to me he clearly was insisting upon the performance of the contract.

The above cited cases, from Ellis & Blackburn, afford interesting illustrations of the effect of continuing to insist upon the performance of a contract after refusal by the other party.

In my opinion, the sending of this telegram throws upon the plaintiff the onus of shewing that at the hour of sending it, and afterwards until in some manner prevented by the defendants, he was ready and willing to perform.

As to the necessity of avowing and proving such readiness and willingness, see observations of Burton, J.A., in *McKenzie v. Dancey*, 12 A. R. 317, at p. 318. See also *Roscoe's N. P.*, 15 ed., p. 481.

Such evidence is entirely lacking, and evidence to the contrary has been furnished by the plaintiff himself.

My brother Galt has extracted passages from his testimony which clearly shew he had no intention to perform the contract when he sent his telegram,—was not willing to do so. He was ready and willing to keep the contract open for the purpose of claiming damages, but not for the purpose of performance. He might have said, upon reading the telegram or learning the contents: "Very well, I will employ my outfit in other work and sue you for such loss as I may sustain." See the above cited case of *Danube R. W. Co. v. Xenos*. This he did not do; and it seems to me he is in no better position than if the telegram had not been sent by Winston.

The plaintiff said he received no reply whatever to his telegram. I do not therefore consider what would have been the effect of the telegram from Winston to Boland, had it been shewn to the plaintiff and acted upon by him.

For the above reasons I agree that the motion must prevail.

Since the argument we have been referred to the case of *Johnstone v. Melling*, 16 Q. B. D. 460, in which may

be found a full statement of the law as to the refusal to perform a contract, and the rights of the other contractor which arise upon such refusal.

CAMERON, C. J., concurred.

Motion allowed.

[CHANCERY DIVISION.]

RE BRITON MEDICAL AND GENERAL LIFE ASSOCIATION,
LIMITED (2).

Foreign corporation—Deposit with Minister of Finance—Application for distribution—Constitutional law—31 Vic. ch. 48 (D.)—34 Vic. ch. 9 (D.)

Canadian policy holders petitioned for distribution of the deposit made by the above company, a foreign corporation, with the Minister of Finance under 31 Vic. ch. 48 (D.) and 34 Vic. ch. 9 (D.), the company being insolvent.

Held, that they were entitled to the relief asked, notwithstanding that proceedings to wind up the company were pending before the English Courts.

The above Acts are not *ultra vires* of the Dominion Parliament.

For any balance of their claims not covered by the deposit, Canadian Policy holders would be entitled to rank upon the general assets of the company.

The definition of "Canadian policy" and "policies in Canada" in 34 Vic. ch. 9 sec. 1 (D.) is not to be interpreted to mean that the deposit is only for the security of policy holders whose policies were issued after the deposit was made and license to transact business in Canada obtained.

THE former petition presented to the Court in the matter of the said company having been dismissed, as reported 11 O. R. 478, a new petition was now presented entitled in the name of the company, and of the Acts 31 Vic. ch. 48 (D.), 34 Vic. ch. 9 (D.), 40 Vic. ch. 42 (D.), 45 Vic. ch. 23 (D.), 47 Vic. ch. 39 (D.) and all other statutes affecting the company, or respecting the winding-up of insolvent insurance companies.

The petition set out that the petitioners were all Canadian policy holders in the company, which was an insurance company duly licensed pursuant to the statutes of the Dominion of Canada in that behalf, to carry on the business of a life insurance company within the Dominion of Canada, and made the deposit for such purposes required by the Act 31 Vic. ch. 48 (D.), and 34 Vic. ch. 9 (D.), but had not issued any further license or made any deposit under 40 Vic. ch. 42 (D.) It then set out facts relating to the claim of Catherine Frances Small to the proceeds of a certain policy in the company, and the delivery of proofs of her claim, and demands made therefor upon the company, and the fact that she had recovered judgment

for the amount of the policy, and the non-payment thereof, and that the Minister of Finance had been duly notified of such non-payment and of the said judgment and demand: that others of the petitioners were entitled to receive the amount of a certain other policy in the said company, but that the same, though duly demanded, had not been paid: that the remaining petitioners each held a policy from the company, amounting in the aggregate to £27,000: that the present value of the claims of the Canadian policy holders in the company amounted to over \$300,000, and the deposit of the company in Canada subject to the claims of the Canadian policy holders to \$106,000, deposited with the Finance Minister of the Canadian Government: that the company was insolvent within the meaning of the Acts in that behalf, and the petitioners desired that the deposit with the Dominion government should be administered under the directions of the Court: and that Toronto had been one of the chief places of business of the company in Canada; and the petitioners prayed that an assignee or assignees might be appointed under the provisions of the said Acts, and that the sum deposited with the Minister of Finance might be distributed amongst the policy holders and other persons entitled to claim thereon, and for these purposes all necessary directions might be given and for further relief.

The petition came on for argument on June 16th, 1886.

J. Maclellan, Q.C., and *Francis*, for the respondents, who were first called on. We object to the jurisdiction. Proceedings are actually going on in England, and no order should now be made, though no doubt if a winding-up order is made in England this Court will be asked to make an ancillary order. In England the form of application in case of a life insurance company now is, to wind up, *or to reduce contracts*. If the latter course is taken, the contracts are reduced and the company goes on. But if the latter course is adopted in England, it will affect holders of Canadian policies. As to an application here to wind up, we say there is no jurisdiction for that, and refer to

The Merchants' Bank of Halifax v. Gillespie, Moffatt & Co., 10 S. C. R. 312. So far as we can ascertain no winding-up order has been made in Ontario in a similar case, except by consent of the liquidator in England, and as ancillary, as in the case of the *Lake Superior Native Copper Company*. We refer to the judgment of Strong, J., in *The Merchants' Bank of Halifax v. Gillespie, Moffatt & Co.*, *supra*, as a very strong argument on the point of *ultra vires*. The Imperial Statute, 33 & 34 Vic. ch. 61, sec. 22, as to reducing the contracts in place of winding-up, is applicable to all the contracts with this company. If you make an order for distribution the policy holders here will be treated differently to those in England should a winding-up order be made there. [PROUDFOOT, J.—But I think the intention was to put them on a different footing to those in England.] The Imperial Act of 1865 (28 & 29 Vic. ch. 63), for removing doubts as to the validity of colonial laws, makes the Canadian policy holders subject to the Imperial Acts of 1868 and 1870 (31 & 32 Vic. ch. 68, and 33 & 34 Vic. ch. 61). We are not a foreign country. Any policy holders must be taken to contract with knowledge of the Imperial Acts. They form part of the written constitution of the company. You are asked to complicate the question enormously which is now under consideration before the Court of the domicile of this company. As to policies which have become claims, every policy which became a claim prior to the application for the winding-up has to be paid in full in the event of the contracts being reduced; but it is otherwise with policies becoming claims subsequently to such application. The winding up is deemed to commence with the presenting of the petition therefor. We admit that if the company had assets here the claimants might proceed and get a judgment, but what is sought is an order which will affect all contracts here. We submit that no order should be made except at the request of the liquidator as ancillary. [PROUDFOOT, J.—But suppose an order is made in England reducing the contracts, how would that affect the Canadian policy holders?] It would affect them because the liability to have their contracts reduced under the

English Acts is, as it were, one of the terms of their contract.

C. Moss, Q.C., and Small, for the petitioners. The only question we propose to discuss is, jurisdiction. The Acts here under which deposit is made are clearly intended only for the benefit of persons insuring in Canada. The intention was to protect persons in this country doing business with companies which came to this country seeking to do business with them. Until it is shewn that there is a surplus in the deposit over the claims of those for whose benefit it was made, the company have no demand or claim for any part of that deposit. They cannot say this deposit is not subject to the provisions of these Acts, because they have, by coming here and making the deposit, made a special contract with the policy holders and with the Dominion of Canada. They cannot be heard to say that this fund is not subject to distribution under our Acts. Besides, the pendency of proceedings in England does not oust the jurisdiction given by our Acts to deal with the deposit here. We say the liquidator in England would never have anything to do with this fund. How could he deal with it? How can he follow out the course provided by the Acts? If he can, it can only be done through agents, doubling or trebling the costs. There is no pretence for saying there is no jurisdiction. See *In re Matheson Brothers*, 27 Ch. D. at p. 230, where Kay, J., points out that whether the Court would make the winding-up order is a different question to that of jurisdiction to make it, and where he thought, as there were assets in England, the order should be made to protect those assets. In *Re Oriental Inland Steam Co.*, L. R. 9 Ch. 557, Sir G. Mellish, L. J., admits, at p. 560, the principle we contend for. Apart from that, the Legislature here has power to oust the jurisdiction of the English Courts. On page 326 of *The Merchants' Bank of Halifax v. Gillespie, Moffatt & Co.*, 10 S. C. R. 312, Strong, J., admits as much himself. There is nothing to conflict with the Imperial Acts in our Acts which only deal with the deposit in Canada. The result of our Acts is that the Canadian policies get a special security for their benefit, and if they are not paid

in full they must then come under the jurisdiction of the English Courts, if they choose to go for the balance. They must, of course, in such case keep up the premiums in respect to the balance. Could the Court in England enjoin these petitioners from taking proceedings here? The jurisdiction, we submit, is complete in the Court to make this order, and it is a proper case for making it, the company being proved to be insolvent. If we do not get the order some Court in one of the other Provinces might make an order, and so gain priority over us. (a)

June 17th, 1886. PROUDFOOT, J.—This is a petition by a number of holders of policies of the association issued in Canada, under the Dominion Acts 31 Vic. ch. 48, 34 Vic. ch. 9, and other statutes, praying that an assignee may be appointed, and for the distribution of the sum deposited with the Minister of Finance.

The deposit was made on the 23rd of August, 1870.

It is not disputed that the association is insolvent.

But it is said that being an English company, and proceedings pending there for the winding-up of the company, that this Court has no jurisdiction, and that the Dominion Acts purporting to confer it are *ultra vires*.

It is also argued that the Canadian policies should be divided into three classes:

1. Policies issued before 1870, and therefore before any deposit was made.
2. Policies issued after the deposit was made and down to 1877, when the company ceased to do business in Canada.
3. Policies that ceased to be executory, but became claims after the commencement of the winding-up proceedings in England, viz., 9th January, 1886.

Only one policy comes under the last head, that upon the life of George T. Kingston, who died on January 21st, 1886.

The reason assigned for distinguishing the first class is that in the 34 Vic. ch. 9, sec. 1 (D.) the expression "Canadian policy." or "policies in Canada," in that Act and in the 31 Vic. ch. 48 (D.), is defined to mean "all policies issued by

(a) Certain other points raised by counsel on the argument are sufficiently referred to in the judgment.—REF.

any company licensed to transact the business of insurance in Canada, in favour of any person or party resident in Canada at the time when such policies were issued."

But I do not think that is to be interpreted to mean that the deposit was only for the security of policy holders whose policies were issued after the deposit was made and license obtained. The object of the Act was to secure Canadian policy holders dealing with foreign companies, and the language is capable of being interpreted as applying to holders of policies issued at any time by a company obtaining a license.

The 31 Vic. ch. 48 (D.), sec. 2, made it unlawful for any insurance company to issue any policy, or take any risk, or receive any premium, or transact any business of insurance in Canada without a license; but the premiums to become due on policies actually issued previous to that Act might continue to be received, and the losses arising thereon to be paid, as if that Act had not been passed. This would allow the receipt of premiums on previous policies without violating the law, if the company did not choose to make a deposit and obtain a license, but it has no application to the case when the company has made the deposit and got the license.

The chief objection, however, was to the jurisdiction. But I think that a simple statement of the object of the petition, and the provisions of the Dominion statutes, shew this to be untenable.

It is not disputed that the Joint Stock Companies Act of 1862 (Imp.) 25 & 26 Vic. ch. 89, may enable English companies to transact business and realize assets in the colonies, and that winding-up proceedings in England may affect ordinary policy holders there.

But under the B. N. A. Act the Dominion Parliament has jurisdiction in matters of insolvency. This jurisdiction might be of little value in case of foreign insurance companies domiciled out of the Dominion, and therefore the Acts above referred to were passed, by which assets of the company should be found within the Province or under the control of the Dominion government, as a security for the Canadian policy holders; and provision was made for

the distribution of those assets in case of insolvency. These policy holders were not ordinary policy holders, but had a security in their favour in shape of the deposit. The Dominion Government said to the foreign companies, you cannot do business here unless you give the security, which is liable to be applied for the benefit of Canadian policy holders in case of your insolvency. The Briton Medical and General Life Association Co. accepted the terms, made the deposit, and obtained the license.

The distribution of this fund is not a winding-up. It is the application of a fund under the terms of the special contract contained in the statutes between the company and the Government on behalf of the policy holders. If there should be any surplus after satisfying liabilities to the secured it would be administered under the liquidation proceedings in England; but there is no such surplus; the deposit will not give the Canadian policy holders more than thirty cents in the dollar, and no proceeding under the Imperial Act—The Life Assurance Act of 1870 (33 & 34 Vic. ch. 61, sec 22)—to reduce the amounts of the contracts of the company instead of winding-up, could be allowed to affect the right to the deposit. I see no reason for questioning the power of the company to make such an arrangement as the condition of their doing business in Canada. They have submitted themselves to the jurisdiction of the Dominion, and must be held estopped from saying they are not bound by the conditions upon which the deposit was made and accepted. The Dominion statutes do not conflict with the Imperial Acts, and are not affected by the 28 & 29 Vic. ch. 63 (1865), which enacts that any colonial law repugnant to any Act of Parliament extending to the colony to which such law may relate shall be void to the extent of such repugnancy.

Much reliance was placed by the counsel for the company upon the case of *The Merchants' Bank of Halifax v. Gillespie, Moffatt & Co.*, 10 S. C. R. 312, and particularly to some expressions of Strong and Henry, JJ.

In that case there was no question of a deposit, and what was sought was, not the distribution of a deposit, but the

general winding up of a company. The company was *The Steel Company of Canada (Limited)*, incorporated in England in 1874, under the Imperial Joint Stock Companies Acts of 1864 and 1867; and an order was made for winding it up under the Dominion Act, 45 Vic. ch. 23. The Court came to the conclusion that the Act did not apply to foreign companies. Strong, J., however, expressed his opinion that if it had applied it would have been *ultra vires* and repugnant to the Winding-up Act of England. And Henry, J., agreed with him. And their reasoning certainly goes far enough to shew that they consider the Dominion Act of a later year (47 Vic. ch. 39) to be *ultra vires*.

But as the present petition does not ask for a winding up, but for the distribution of a special trust fund, that case appears to me to have no application.

It was further objected that the Canadian policy holders had applied for leave to be heard in the winding up proceedings in England, and had therefore elected their forum. It appears that the Canadian policy holders have instructed solicitors in London to watch their interests, chiefly with respect to the deposit with the Dominion Government, upon which they claim a special lien in priority to other policy holders; and nothing has been done beyond making an application that they should be represented as a special class upon the inquiries and proceedings in England, but no order has been made upon the application, which stands adjourned *sine die* until after the completion of certain investigations into the affairs of the company, directed by the Court in England.

There is nothing in that to prejudice the present application. The Canadian policies are not extinguished by the application of the deposit, and for any balance not covered by the deposit they would be entitled to rank upon the general assets of the company.

I think the petitioners entitled to the order they ask, and refer it to the Master to appoint an assignee, and the fund deposited with the Government will be distributed and applied as provided by the Act.

Costs out of the fund to the petitioners.

[CHANCERY DIVISION.]

WATSON v. WESTLAKE.

Trade mark—Infringement—“Imperial”—Word in common use not eligible as trade mark.

The plaintiffs having registered as a trade mark the words “Imperial cough drops” now sued the defendant for infringement thereof by selling confectionery under the name “Imperial Cough Candy.”

Held, that inasmuch as the evidence shewed that the word “Imperial” as a designation or mark for cough drops or candy was really public property, and a common brand or designation for candy long before the plaintiffs’ registration, the plaintiffs had not the right to attribute to that which he might manufacture a name which had been for years before a well-known and current name by which that article was defined, and the action must be dismissed.

Partlo v. Todd, 12 O. R. 171, followed.

THIS was an action brought by R. & T. Watson for alleged infringement of a registered trade mark under the circumstances which are fully set out in the judgment.

The action was tried before Ferguson, J. at Toronto, on May 7th, 1886.

J. D. Ridout, for the plaintiffs, referred to *Filley v. Fassett* 44 Mo. 168; *Seixo v. Provezende*, L. R. 1 Ch. 192; *Glen Cove Manufacturing Co. v. Ludeman*, 32 U. S. Patent Office Gaz. 255; *Sebastian on Trade Marks*, 2nd ed. 98, 99, 122; *Crawford v. Shuttock*, 13 Gr. 149; *Blackwell & Co. v. Dibrell & Co.*, 14 U. S. Patent Off. Gaz. 633; *Anheuser Busch Brewing Association v. Clarke*, 34 *ib.* 562; *Davis v. Reid*, 17 Gr. 69; *Davis v. Kennedy*, 13 Gr. 523; *Millington v. Fox*, 3 M. & Cr. 338; *Re Barker’s Trademark*, 53 L. T. 23.

M. D. Fraser for the defendant. The goods are entirely different, and the name is also entirely different. But the plaintiffs’ right may be perfectly good, and yet the defendants have not infringed it; the articles are so different. I refer to *The Civil Service Supply Association v. Dean*, 13 Ch. D. 512; *Wotherspoon & Co. v. Gray & Co.*,

2 Sess. Cas. (3rd Series) 38 ; *Leather Cloth Co. v. The American Leather Cloth Co.*, 11 H. L. C. 523.

June 29th, 1886. FERGUSON, J.—The action is for alleged infringement of a registered trade mark. The plaintiffs are a firm carrying on business in Toronto as wholesale confectioners. They allege that the defendant is carrying on business as a confectioner in the City of London. The plaintiffs say that they are the registered proprietors of a specific trade mark (applied to the sale of cough drops), that the registration was under the provisions of the Act of 1879 : that the trade mark so registered consists of the words “Imperial Cough Drops,” the essential feature of the mark being the word “Imperial,” that the registration took place on January 21st, 1885, and they claim to have the exclusive right to the use of the words “Imperial Cough Drops,” of which they say the word “Imperial” is the essential part, as their trade mark for the period mentioned in the Act as applied to the sale of their cough drops or confectionery, and as a distinguishing mark for goods or candies of their own preparation or manufacture in the Canadian market.

They allege that the defendant has infringed their trade mark in this way : that in his business as a confectioner, he has lately adopted and used the words “Imperial Cough Candy,” as a trade mark applied to his goods, on a printed wrapper, which label or wrapper has imprinted thereon in large letters the word “Imperial” in combination with the words “Cough Candy,” the word “Imperial” being (as the plaintiffs say) the essential feature of their trade mark. They further say that the defendant has lately shipped to certain merchants in Toronto a considerable quantity of his candy, where it has been offered for sale enveloped in wrappers containing the words “Imperial Cough Candy,” imprinted thereon, in fraud of their rights, and in infringement of their trade mark. The plaintiffs say, that they have, during the past year, advertised extensively, and that their goods are well

known as "The Imperial Cough Drops;" that large sales have been made under that name and that they may sustain great damage by reason of the alleged wrongful acts of the defendant. They allege that no goods other than their own of the same kind are or ever have been known in the Canadian market as "The Imperial Cough Drops," and that the term "The Imperial Cough Candy," under which the goods of the defendant have been lately manufactured and advertised for sale, and sold, is calculated to deceive the public, the trade mark of the defendant being, as they say, almost identical or synonymous, and similar in sound to that of the plaintiffs, and they say they believe the defendant has adopted this name for his candy with the object in view of so deceiving the public, and of making sale of his candy by means of the reputation acquired for the candy or cough drops of the plaintiffs' manufacture.

The defendant denies the statements of the plaintiffs generally. He denies the alleged infringement, and amongst his defences he says, that for upwards of twenty-five years before the commencement of this action, and long before the plaintiffs commenced business, he manufactured, and sold to merchants in the trade and to the public throughout the Province of Ontario, certain goods of the same kind and description as he is now manufacturing, called and known as "Westlake's Imperial Cough Candy," of which the essential words were "Imperial Cough Candy," and that he, during the whole, or greater portion of that time, put up and labelled his said goods in paper wrappers on which, with other words, were imprinted the said words "Westlake's Imperial Cough Candy:" that he was at great expense in advertising such goods to the trade, and although not registered by him, his goods were well known to dealers and to the public under the said name or trademark, and also under the name "Imperial Cough Candy:" that the essential words were "Imperial Cough Candy:" and that his (the defendant's), name formed no part of such trademark or designation, but was only intended by him to denote that he was the manufacturer

or vendor of the goods : that for several years prior to 1885, he, to some extent, retired from his former business, but that he always continued such manufacture to an extent sufficient to supply and fill special orders given to him for said goods, and that the goods when so manufactured and sold, were sold and marked with the said trademark, brand, or label previously in use by him. The defendant further says, in his statement of defence, that in the year 1885 he decided to enter more extensively into the manufacture and sale of the goods under the name or style of the "Imperial Manufacturing Company : " that such business has been and still is carried on by him under that name and style, and that he has continued to manufacture and to sell the same goods, and to put the same upon paper wrappers as he had always done, but as the business was not being carried on under his own name, but under the name "The Imperial Manufacturing Co.," and also believing that dealers in the trade who purchased his goods would desire that their names should appear on the box or paper, he discarded the use of the word "Westlake" on the wrapper or box, and imprinted thereon the following words, viz : "Try the Imperial Cough Candy," for the cure of coughs, colds, * * and that on the paper box enclosing such goods, there was the additional words "Prepared and put up expressly for ————," leaving a space for the purchaser to insert his name on the box or package if he so desired. After alleging many other things that are, as I think, chiefly argumentative, the defendant says that the word "Imperial" is a word in general use and is applied to numerous articles in common use, and he denies that the plaintiffs have or can have any or such property therein as would entitle them to exclude the defendant from the use thereof in connection with his said business ; and he charges the plaintiffs with having obtained the registration of their trademark with the object and intention of inducing the public to purchase their goods, under the belief that they were purchasing the defendant's goods, and thereby injuring the defendant.

As to the word "Imperial," in the case *Crawford v. Shuttock*, 13 Gr. at p. 151, the late Chief Justice (then V. C.), says: "I confess I have felt some hesitation, by reason of the frequent use of the word 'Imperial' as a term of designation in various branches of manufacture, as to whether the plaintiff has by his trade mark registered under the statute, appropriated to himself the exclusive use of the word for the article manufactured by him, but upon consideration I incline to think that he has. If the word had been an adjective, such as 'superior,' 'excellent,' or the like, I should have thought otherwise, and concluded that the star was the trade mark, and that a manufacturer had no right to appropriate to his own exclusive use an adjective of description of the quality of the article manufactured by him, but the word 'Imperial' is a sort of fancy designation inappropriate as a description of quality, and is a mere term of distinctive designation, and must, I apprehend, be taken as part of the plaintiffs' registered trade mark, and so within the statute * * ." In this view, I need not say that I concur. The decision, so far as I know, is binding upon me.

The plaintiffs have been in business since the year 1874. They have been making cough drops for nine years. They at first called them "Imperial Medicated Cough Drops." They dropped the word "Medicated"—as one of them said in his evidence, because they were not apothecaries or professional men.

It is not contended, and I think it could not be that there is any similarity of appearance between the defendant's goods and the goods of the plaintiffs. The plaintiff, Robert Watson, in his evidence says there is no similarity between them, and that if a person were acquainted with the two he could not be deceived or mistaken. He also says that if the defendants had retained the name "Westlake" the plaintiffs would not have complained. He says that he knows the word "Imperial" to be a word of frequent use and application to several kinds of confectioner's goods as well as "Cough Candy," and that the

plaintiffs themselves use and apply it to several kinds of their own goods.

George Clarkson, the first witness called by the plaintiffs, says he would be doubtful about taking the word "Drop," as indicative of the same kind of goods as the word "Candy," and he would be doubtful about saying that "Imperial Cough Drops" would be confounded with "Imperial Cough Candy." He is assistant manager in a large wholesale drug store in Toronto. He says the plaintiffs goods are put in 5 lb. boxes, and are kept by druggists as "Druggists Sundries." He also says that his firm had purchased some of the defendant's goods in Toronto.

Wm. Foster, a retail dealer in the city called by the plaintiffs says, if a person in his store asked for "Imperial Cough Candy," he would give him "Imperial Cough Drops." But if he asked for "Imperial Cough Drops" he would not give him "Imperial Cough Candy." He says the drops are candy in fact.

I think there is no evidence whatever going to show that any person has ever, in fact, mistaken the goods of the defendant for those of the plaintiffs, or those of the plaintiffs for the goods of the defendant.

The defendant commenced business in London in the year 1849. There is no doubt, I think, that he commenced to manufacture candy and sell it as "Westlake's Imperial Cough Candy," in the year 1850, and that he then commenced to use these words as a designation of his goods by putting them upon his wrappers, boxes, &c., containing the goods, and that he did this continuously in an extensive business from that period till, by misfortune, he was burned out some twelve years ago, suffering thereby a severe loss which disabled him from carrying on business as he had up to that time done. There is, I think, no doubt that during the period up to the fire, his goods were extensively known by the name or designation of "Westlake's Imperial Cough Candy," and that they were always so labelled and marked. I think it is shown that the defendant's goods had acquired a reputation, and were

known by this name or designation. I think the evidence shows that after his misfortune by the fire the defendant continued to manufacture the same goods, but on a much reduced scale to fill orders that came in and to make some for sale besides and, as it were, to struggle on in this way continuously adhering to the same mark or designation down to the year 1883; that the goods were bought and sold by this name, but that *printed* labels were not, during a great part of the time from the time of the fire to 1883 used, and although the evidence of the defendant and the witness Parker are not altogether in accord on the subject, and although discrepancies can be found between what the defendant said or left unsaid in his examination for discovery and what he said at the trial on this immediate subject, I incline to the conviction that during this interval the goods were generally marked "Westlake's Imperial Cough Candy" in some way, and so far as that may be important, I think I must find that such was the fact. I also find upon the evidence that there was no fraudulent or improper intent on the part of the defendant in making the change by discontinuing to use the name "Westlake," but that this was done for the reasons stated in the statement of defence, which appear to me to be reasons that cannot be complained of on any moral ground.

As I have said, it has not been shown that any person has been deceived or mistaken by what the plaintiffs complain of so as to purchase the goods of the defendant believing them to be the goods of the plaintiffs, and so far as I am able to understand the matter I do not think that what the defendant is doing is calculated so to mislead the public to the prejudice of the plaintiffs. Looking at the marks, labels, wrappers, &c., and all that appears I cannot think that the public would or could be so misled. The evidence is, I think, extremely scanty on the subject. There is, I think, as much of it, if not more, that tends to show that the public would not be so misled as that they would; and I think the plaintiffs' case must stand or fall upon whatever right they may have acquired as against the defendant solely by reason of their having obtained this

registration of the trademark containing the word "Imperial" as the essential part of it. The evidence, I think, shows that this word "Imperial" was long before the registration of the plaintiffs' trade mark frequently used as a designation of various kinds of candy. Parkins says that he has sold Imperial lozenges, and cinnamon, white-gum, cream, and almonds, all designated by the word "Imperial." The defendant has used the word "Imperial" as has been already stated. Eccleston, a man who has been fifty years in the business, says that he heard the name Imperial cough drops twenty-five years ago, and he thinks that Hessin made Imperial cough drops twenty years ago. Looking at the evidence before me I cannot avoid the conclusion that the word "Imperial" as a designation or mark for candy was really public property, and a common brand or designation for candy long before the plaintiffs' registration. If any right had been acquired in regard to the word it would rather appear that the defendant had acquired it. This being so, the very recent decision of Mr. Justice Proudfoot, in the case *Partlo v. Todd*, 12 O. R. 171, would seem to apply showing that the plaintiff had not the right to endeavor to attribute to that which he might manufacture a name which had been for years before a well known and current name by which that article was defined.

I have not overlooked the remarks of the learned Judge who decided *Partlo v. Todd*, *supra*, in regard to the Statute under which registration takes place, or the fact that he was following a previous decision. It seems wholly unnecessary for me to express any independent opinion on that immediate point in that case.

I am of the opinion that the action should be dismissed, and it is dismissed with costs to be paid by the plaintiffs to the defendant. This is what the defendant in his statement of defence has asked.

The judgment is accordingly.

[CHANCERY DIVISION.]

RE ARMSTRONG.

Sewer rates—Assessment—Personal charge—42 Vic. ch. 31 sec. 25 (O.)

Sewer rates charged under by-law 468 of the City of Toronto prior to the coming into force of 42 Vic. ch 31 sec 25 (O.), (March 11th, 1879,) form a personal charge only, the said enactment not being retrospective.

THIS was a petition under the Vendor and Purchaser Act by one Adam Armstrong, of the City of Toronto, wherein he set out that certain property therein described formed part of what was known as the Mercer estate, which said estate became vested in the Crown by escheat on the death of the late Andrew Mercer, intestate, on or about the 13th day of June, 1871: that the said property remained so vested in the Crown and under the control of the Government of the Province of Ontario until the 21st day of January, 1886, when the petitioner became the purchaser of the said property from the said Government. that at the date of the said purchase the sewer rates payable under by-law No. 468 (a) of the City of Toronto, for the sewer adjacent to the said property, and which said sewer rates were a charge or lien upon the said property, or a personal charge against the owner of the lands at the time the said sewer rates accrued due, remained and were unpaid from the year 1869 to the year 1878, both years inclusive amounting in all to the sum of \$320.20, and

(a) By-law 468 of the city of Toronto, is entitled "A by-law to provide for regulating the common sewers, and an annual rental or sewage rate, was passed in October 26th 1868, and will be found in the collection of the by-laws of the city of Toronto, published by Henry Rowsell, Toronto, 1870, and contained in Osgoode Hall library. Sec. 11 of it provides: "All persons who own or occupy property which is drained into any such common sewers, or which is required by this by-law to be drained into such sewer, and who have not heretofore paid for the privilege of so draining as aforesaid, shall be charged an annual rental per foot of the frontage of such property abutting on such street, or portion of a street as aforesaid, for the use of such common sewer, etc."—REP.

which said sum was claimed by the City of Toronto to be a lien or charge upon the said lands for the amount thereof, although the said sewer had not been used by the owners or occupiers of the land: that the said sewer rates as he, the petitioner, averred, were a lien charge, or encumbrance upon the said lands, although not constructed under the local improvement system, whereas the vendors thereof, the Government of the Province of Ontario, denied that they were such lien, charge or encumbrance, or that they were liable as vendors to pay the same and refused to pay the said arrears of sewer rates, or any part thereof, or otherwise to satisfy and discharge the same; and the petitioner therefore prayed: 1. That the said sewer rates might be declared to be a charge on the said lands, and that the vendors of the said property, the Government of the Province of Ontario, might be ordered to pay the said arrears of sewer rates: 2. That for the purposes aforesaid, all necessary directions might be given and accounts taken.

The petition came up for argument on May 5th, 1886, before Boyd, C.

Cook, for the petitioner, referred to the Municipal Amendment Act of 1879, 42 Vic. ch. 31 (O.), sec. 25, of which provides: "Every special assessment made, and every special rate imposed and levied under any of the provisions of the said Municipal Act" (R. S. O. ch. 174), "and all sewer rents and charges for work or services done by the corporation, on default of the owners of real estate, under the provisions of any said by-law of the council of the said corporation, shall form a lien and charge upon the real estate upon, or in respect of which the same shall have been assessed, and rated or charged, and shall be collected in the same manner, and with the like remedies, as ordinary taxes upon real estate are collectable, under the provisions of the Assessment Act."

Malone, contra. The question is, is the enactment just cited retrospective? Under the by-law these rates are a

mere personal charge. I refer to *Moore v. Hynes*, 22 U. C. R. 107; *Re McCutcheon and the City of Toronto*, *ib.* 613.

May 5th, 1886. BOYD, C. Held that the sewer rates formed a personal charge, and were not a lien.

[CHANCERY DIVISION.]

AMBROSE V. FRASER ET AL.

Husband and wife—Covenant running with land—Assignment of the reversion by the lessor to his wife—Set-off.

Held, that a married woman, though married before May 4th, 1859, was not bound by a covenant of her husband, entered into by him for himself, his heirs and assigns, as lessor of certain lands, to pay at the expiration of the lease for a certain malthouse which the lessee was to have liberty to erect on the demised premises, though the reversion had been assigned to her husband and another as trustees for her, in such a way that she had the entire beneficial interest, and though the covenant ran with the land.

Held, also, that a claim on behalf of the said trustees for rent in arrear and for damages for new repair was not matter of set-off against damages recovered against the husband for breach of his covenant to purchase the malthouse, though he was one of the trustees, they not being matters arising in the same right.

THIS was an action brought by Thomas H. Ambrose against William Fraser, Augusta M. F. Fraser, his wife, and one Williams, to recover the amount of an award, under circumstances which are fully set out in the judgment.

The case was tried at Toronto, before Ferguson, J., on May 17th and 18th, 1886.

C. Moss, Q.C., and *W. Barwick*, for the plaintiff. If the lands were still in the hands of Fraser, the plaintiff would have a lien on the premises, and in equity he will have this lien as against all volunteers after him, and there are here only volunteers after Fraser. This would be ineffectual in the present case for the property is gone. The principle

nevertheless, illustrates the reason why Fraser and Williams cannot claim the \$275 except as a set-off. They can only claim this sum by virtue of their being trustees of the lands, and it must be allowed on the award which is against both of them. But no case for the \$100 or the \$175 is made out. Mrs. Fraser is liable to the plaintiff on two grounds (1) as having been the beneficial owner from the beginning; (2) because the covenant runs with the land and she was an assign and the covenant was made on her behalf. We refer to the evidence given in the former suit of *Vinden v. Fraser*, 28 Gr. 502. As having been all along the owner she is liable for the expenditure upon the property apart from any covenant. There is an implied promise to pay for the advantage that she gained by what was done. But the covenant runs with the land, and for whatever accrues due during the time that any grantee holds the land, he is liable upon the covenant that runs with the land. See *Mansel v. Norton*, 22 Ch. D. 769; *Minshull v. Oakes*, 2 H. & N. 793; *Spencer's Case*, Sm. L. C. 8th ed. Vol. 1, pp. 68 seq.

B. B. Osler, Q.C., and *Gunther* for the defendants. The plaintiff cannot contend Mrs. Frazer was owner at the date of the lease by reason of his own pleading. As to her being bound by reason of the covenant running with the land *Emmett v. Quinn*, 7 A. R. 306, is the case most in favour of the plaintiff. But this case is distinguishable on the ground that the covenant here is to pay only one of the lessees, not the lessees who were really the partnership. See also *Haywood v. The Brunswick Permanent Benefit Building Society*, 8 Q.B.D. 403. But even if the covenant did run with the land, it ceased to run when the trustees were evicted by title paramount by the mortgagee. Privity of estate was the only reason of such liability: *Hillock v. Sutton*, 2 O.R. 548. The conveyance away of the estate before action without fraud gets rid of the liability on the covenant running with the land. Then are both the trustees and the *cestui que trust* liable on the covenant? *Lewin on Trusts*, 8th ed. p. 234-8. The *cestui que*

trust should not be made a party : *MacLennan* O.J.A., 2nd ed. p. 234 ; *White v. Hunt*, L. R., 6 Ex. 32. Then it is not shewn that Mrs. Fraser has separate estate. The lease was made after the Married Woman's Property Act of 1872 came into force, and we refer here to *Wagner v. Jefferson*, 37 U. C. R. 551 ; *Johnson v. Gallagher*, 3 DeG. F. & J. 494 ; *London Chartered Bank of Australia v. Lempriere*, L.R., 4 P.C., 572 ; *Wright v. Chard*, 4 Dr. 673. The only right against a married woman is that defined in *Lawson v. Laidlaw*, 3 A.R., 77. As to the \$275 the trustees should have judgment for it.

Moss, in reply. Since the Married Woman's Property Act of 1884, it is only necessary to show that the married woman had separate property at the commencement of the action ; but Mrs. Fraser had separate property at the making of the lease, and at the commencement of this action. As to the covenant it is with both the lessees. The lessor covenants with both to pay the money to one. See *Macdonald v. Macdonald*, 11 O.R. 187, as to following the decisions of our own Court of Appeal. I also refer to *Woodfall*, L. and T., 13th ed., 163 ; *Harley v. King*, 2 C. M. & R. 18.

August 31st, 1886. FERGUSON J.—On or about the 23rd day of November, 1872, a lease was executed by the defendant Fraser to the plaintiff and one Winslow of certain lands in Port Hope, the place being known as "The Highland Brewery" for the term of ten years from that date. In this indenture of lease is contained a covenant on the part of Fraser, the lessor, made with the lessees, to the effect that the plaintiff, one of the lessees, should be at liberty to erect a malthouse on the demised premises at a cost not to exceed \$4,000, and that at the expiration or other sooner determination of the demise, the lessor, Fraser, his heirs, or assigns, would pay to the plaintiff his executors, &c., the fair and just value of the malthouse, taking into account &c. &c., and in case of disagreement as to the amount to be paid for the malthouse, the sum should be determined by

arbitration, with usual provisions as to the manner of choosing the arbitrators, &c. The plaintiff did erect the malthouse, and it was by him let to his firm, composed of himself and the said Winslow.

In the year 1878 Winslow transferred and assigned all his rights and interests in the lease to the plaintiff. The plaintiff in his pleading states that at the time of the execution of this lease the defendant Fraser (the lessor), was the owner of the land in fee. He also states that during the continuance of the term the defendant, Fraser, granted and conveyed the lands in such manner and form as that the same became vested in him and his co-defendant Williams, as trustees for the defendant, Augusta M. F. Fraser, his, the defendant Fraser's wife, and that the beneficial interest and use of the premises were vested in her at the commencement of this action,

It appears, however, that the lands and premises have been sold under a mortgage thereon of a date prior to the date of the lease, and that the whole of the purchase money was required to pay the claim of the mortgagee.

There was a disagreement as to the amount that should be paid the plaintiff for the malthouse and an arbitration was had between the plaintiff and the defendants, Frazer and Williams; but it does not appear that the defendant, Augusta M. F. Fraser, was a party to such arbitration, unless she should be considered as represented by her co-defendants thereat.

The arbitrators made an award fixing the amount to be paid for the malthouse at the sum of \$3,059.96. It was said that for certain reasons this award was not valid when made, but Counsel conceded that as it had not been moved against it must stand and be considered as good. The action is brought for the purpose of recovering the amount awarded and interest. The plaintiff considered it very important that he should recover a judgment against the defendant, Mrs. Fraser, as it was said that the defendant Frazer, the covenantor, is not good for the amount. The marriage between her and her husband, Fraser, took place

in the year 1849 without any marriage contract or settlement. It appears that she had separate property at the time of the execution of the lease, and has ever since had and now has, separate property.

It was admitted that the plaintiff was entitled to a judgment against the defendant, Fraser, for the amount of the award and interest, the plaintiff, however, saying that the sum of \$275, composed of a quarter's rent unpaid \$175, and \$100, for non-repair, which it was virtually conceded was made out under the counter-claim of the defendants Fraser and Williams, should be deducted from the amount of the award and interest, the defendants contending differently, and that there should be judgment in their favor and against the plaintiff for this \$275. I may here say, that the sum is, I think, the amount that was found under the counter-claim.

The chief matter of contention was as to whether or not the defendant, Mrs. Fraser—or rather her separate estate—was shown to be liable for the payment of the amount of the award and interest.

The plaintiff placed this branch of his case on two alternative grounds. (1) That she was really the owner of the lands and premises demised, and that the covenant in the lease was made on her behalf, and that in this way she was and is liable upon the covenant. (2) That if she was not, but her husband was the owner of the lands at the time of the execution of the lease, yet that the covenant is one that ran with the land, that as she became the assignee of the reversion in 1873, and continued to be the assignee and owner until the time of the sale of the land under the prior mortgage (which was in the year 1885, and as I make out, after the commencement of this action) she was the assignee and owner of the reversion at the time of the erection of the malthouse by the plaintiff, and at the expiration of the lease when it should have been paid for, she is—or rather her separate estate is—liable for the payment of the amount settled and fixed by the award—or at all events for the proper value (within the meaning of the covenant) of the malthouse.

As to the ownership of the land at the date of the lease. The plaintiff's pleading says that the defendant, Fraser, was the owner of it. This defendant is called as a witness on the part of the defence, and he swears that he was then the owner of it. The conveyancing accords with the idea that he was then the owner of the lands. But certain evidence given by this defendant and his wife, the defendant, Mrs. Fraser, in a former suit, *Vinden v. Fraser*, was referred to, showing that both he and his wife in that suit in their testimony said that she and not he, was the owner of the land. It appears that he had been managing her estate and moneys and, from what appears one would judge that each had at the time these lands were purchased and paid for money to a considerable amount; that payment of the purchase money of this land and certain encumbrances at the time existing upon it were paid by checks. In giving his evidence, the defendant, Fraser, said that these checks and other papers had been lost and were not to be found at the time the evidence alluded to was given in the former suit, and he was then under the belief that the purchase money and incumbrances had been paid out of his wife's money, and this was his reason for giving the evidence that he then gave, he supposing that as the land had been paid for with her money it belonged to her, but that since that time he had by accident found the checks, and from these and the recollection that a perusal of them called up he is now quite certain that the lands were paid for out of his own money. It was said that the books kept by him at that time were produced at the trial in the former suit and that they showed that the lands had been paid for out of his wife's money. These books were not produced before me and I am in comparative ignorance as to what they contained. As to the evidence given in the other suit by Mrs. Fraser, she has not been called as a witness in this suit and I have had no opportunity to form any opinion as to her understanding of the subject or her veracity. It was said that she obtained her information from her brother and her

husband, and it is not improbable that she did not and does not really know how the fact was as to the payment of the purchase money and encumbrances. The case *Washburn v. Ferris*, 14 Gr. 516, is, as it appears to me, more than sufficient to show that these defendants are not precluded by reason of the evidence they gave in the former suit, or by reason of the recovery in that suit, from showing in this action what was the actual fact, even if the plaintiff were not precluded by his pleading from gain-saying the statement that Fraser was at the time the owner of the land, and looking at all the circumstances disclosed and the, to me, apparent candour of Fraser in his statements, admissions and explanations, I think the proper conclusion (though the matter is not free from suspicion and doubt) is that he was—as stated by the plaintiff in his pleading—the owner of the land, which appears to be an equity of redemption—at the time of the execution of the lease, and this being so the covenant in question, was a covenant made on his own behalf, he, however, covenanting as well for his heirs and assigns. Then was this a covenant of the kind that runs with the land—or rather that ran with the reversion? In the 13th ed. of *Woodfall* on Landlord and Tenant, at p.164, the author says: “It has been stated in many prior editions of this work that a covenant by a lessor to pay a valuation for all trees planted, was a personal covenant not running with the land, and for this *Grey v. Cuthbertson*, 4 Doug. 351; 2 Chit. 483; 1 Selw. N.P. 448, was cited; but that case which is very briefly reported, seems to have been decided on the ground that assigns were not named in the covenant; and from the later case *Gorton v. Gregory*, 3 B & S. 90, it may perhaps be inferred, though the point was not expressly decided, that a covenant to pay for improvements to be executed on the land, whether by the lessor or lessee, runs with the land and the reversion, if assigns be named; and this is borne out in principle by the important case *Mansel v. Norton*, 22 Ch. D. (C.A.) 769.” The case *Grey v. Cuthbertson*, is referred to in the

case *Coffin v. Talman*, 4 Seldens (N.Y.R.) at p. 468, the learned Judge there taking apparently the view that the ground of the decision was that assigns were not named in the covenant. I do not see that the case *Emmett v. Quinn*, 7 A.R. 306, has any material bearing on the question here, because, according to the opinion of the majority of the learned Judges the assignee was not named, the lease being a carelessly drawn one, professing to be drawn under the provisions of the Act respecting short forms of leases. In the present case the assigns are unmistakably mentioned in the covenant, and this, according to the view expressed by Mr. Justice Burton evinces an intent to bind the land, and in such a case the obligation becomes connected with the estate.

In *Mansel v. Norton*, 22 Ch. D. 769, the covenant was by the lessor, who covenanted for himself, his heirs, executors, administrators and assigns, that at the expiration of the lease he, his heirs, or "assigns," would pay the the tenant for all the tenant's property in and upon the farm, to be ascertained by a valuation &c. The land was devised to the plaintiff for life, and the opinion of the Court was that he was the person primarily liable to pay the tenant. He had paid the demand of the tenant and then sued the representatives of the estate of the lessor for the amount. The holding was that he could not recover.

In the case *Haywood v. Brunswick &c. Society*, 8 Q.B.D. 403, the covenant named the assigns. It was a covenant—amongst other things—to build, and it was held that it did not run with the land. The case, however, was not a case of landlord and tenant. See 8th ed. of Smith's L.C. p. 103, where it is suggested that the burden of a covenant will not run with the land in any case except that of landlord and tenant.

In the present case the covenant mentions the assigns of the lessor, the covenantor, and I think the authorities show that it is a covenant that runs with the land.

In *Emmett v. Quinn*, 7 A.R. 306, Mr. Justice Burton says at p. 319: "When, therefore, the covenantor names

his assigns, it evinces an intent to bind the land, and the obligation becomes connected with the estate." The effect of this, however, seems to be that each successive assignee of the estate is bound by the covenant in respect of any breach that occurs after he becomes the assignee, and while he is the owner of it. But an action may be brought and maintained against him after he has assigned the estate, or ceased to be the owner of it, in respect of a breach that occurred while he was the owner: *Harley v. King*, 2 C. M. & R. 18, and *Platt on Leases*, vol. 2, page 401.

In this way it is sought to make the defendant, Mrs. Fraser, liable on the covenant, and to make her separate estate liable, she being the wife of the covenantor to whom the reversion was in equity assigned by him during the term and before breach of the covenant, the breach having taken place while she was entitled to the reversion. It was said in argument that her liability (alleged) is by reason of the "privity of estate." That is one way of expressing the idea generally, for as Mr. Justice Burton puts it, the obligation becomes connected with estate. As nearly as I can understand the nature of such a covenant, it is a promise made by the covenantor for himself and the successive assignees of the reversion, and is binding upon each of the successive assignees in respect of breaches occurring or rights of action accruing during the time that he or she is the owner of the reversion.

I do not, however, see how the separate property or estate of a married woman becomes bound in this way. In this case the covenantor was her husband. He might have made a covenant not naming his assigns, but he chose to do as he did, and it seems to me that to give effect to the plaintiff's contention would be to say that the separate property of a married woman who was married before the 4th of May, 1859, without any marriage contract or settlement, is bound by a contract made by her husband. It is not pretended that she made any contract herself, or that any credit was given or anything whatever done in

respect to or on the faith of her separate property or estate. *Wagner v. Jefferson*, 37 U. C. R. 551, shows that the separate property of a married woman is not bound by the contracts of her husband even though the very property was benefited by the consideration obtained by the husband. It may be that there was a lien or some right against the identical property. It is, however, useless to consider or discuss this, for that property is disposed of as before stated by the mortgagee. The marriage, as I have said, was in 1849. The assignment of the reversion and the breach of the covenant were after the passing of the Married Woman's Act, 1872, and before the Act of 1884. I was referred to no authority that seems to me an authority for saying that the separate property of this defendant, Mrs. Fraser, is so made liable for the payment of the money claimed by the plaintiff, and all I can say further is that I do not see how, under the provisions of the statutes respecting the property of married women, it is so made liable, and I think the action should, so far as it relates to her, be dismissed, with costs.

The plaintiff is entitled to judgment against the defendant Fraser, for the amount mentioned in the award, with interest as they ask it, I suppose from the 20th of August, 1883, with costs also.

I think the \$275 proved under the counter-claim pleaded by the defendants Fraser and Williams, cannot properly be set off against the plaintiff's demand, because the matters of the two are not in the same right. As I understand the matter this sum is owing to these defendants as trustees, and the plaintiff's claim is against the defendant Fraser individually, and payable out of Fraser's own estate. I think these two defendants should have judgment against the plaintiff for this sum, with costs.

The judgment is accordingly.

A. H. F. L.

[CHANCERY DIVISION.]

WILSON V. GRAHAM ET AL.

Will—Construction—Absolute bequest cut down to estate for life—Precatory trust.

A testator made his will as follows : “ I bequeath to my wife E. K. all the real and personal property that I die possessed of * * My wish and desire is, that she shall divide the said real estate or personal property, £50 to my daughter S., £50 to my daughter E., the balance to my son W., (providing any more) (if a daughter) £50, and if a son then the balance after £50 to each of my daughters to be equally divided betwixt them at her decease.”

Held, reversing the decision of Proudfoot, J., that the widow, E. K. took a life estate in the whole real and personal property, excepting what was necessary to pay the legacies.

THIS was a suit brought by Eleanor Mary Wilson, a posthumous child of William B. Kerns deceased, for the purpose of administering the estate of the deceased, and of declaring the construction of his will, the defendants being the widow, Eleanor Kerns, now Eleanor Graham, who was also executrix of the said will, her co-executor, William Buntin, and the other surviving children of the deceased.

The bill of complaint set out the will, which was as follows :

“ This is my last will and testament. By the grace of God :

This my last will and testament, I do hereby disclaim all others, being of sound mind labouring under bodily affliction, I do hereby bequeath to my beloved wife Eleanor Kerns all the real and personal property that I die possessed of after my funeral expenses and just debts are paid. My wish and desire is that she shall divide the said real estate or personal property, fifty pounds to my eldest daughter Sarah, fifty pounds to my daughter Elizabeth, the balance to my son William, (providing any more) (if a daughter,) fifty pounds, and if a son then the balance after fifty pounds to each of my daughters to be equally divided betwixt them at her decease. I do hereby appoint to be

my lawful executors, Eleanor Kerns my wife, Joshua Kerns, and William Buntin.

Signed and sealed in the presence of

(Signed) E. B. HALSTED,

(Signed) JAMES WALDER.

(Signed) WM. B. KERNS. [L.S.]

The bill then set out the facts which are also set out in the judgments, and further alleged that at the time of the decease of the said testator all his children were minors, but were now of full age, excepting William, who had survived the testator, but had since died; and submitted that William was entitled to all the lands of which the testator died possessed, subject to the legacies, and that the surviving children of the testator and his widow were his (William's) only heirs and heiresses-at-law, and other matters not material to mention here.

In her answer the widow of the testator, amongst other things, submitted that under the said will she was entitled to a life estate in all the lands of the testator, and that the legacies were not payable till after her death, but that, if they were payable forthwith, she had expended large sums in rearing, maintaining, and educating the plaintiff and her sisters, under such circumstances as that the Court would have allowed, and ought now to allow her the whole of the said legacies for such purpose.

The suit was heard at Hamilton, on October 6th, 1885, before Proudfoot, J., who gave judgment that the son William was under the will entitled to all the property real and personal of the testator subject only to payment of the legacies and to the widow's dower, and that the widow was entitled to a life estate since the death of the said William in the lands which were of the said testator and which then remained unsold by the said son William, and that the remaining children of the testator were entitled to the remainder therein, and that the widow Eleanor Graham was entitled to a proper allowance for the maintenance, education and support of the children

of the testator during their minorities and so long as they were maintained by her, and referred it to the Master to enquire and state what would be a proper allowance.

From this judgment the widow, Eleanor Graham, appealed to the Divisional Court, moving that it should be varied, among other things, by declaring that she was under the will in question entitled to a life estate in all the property of the testator both real and personal since his death.

The plaintiff served a notice of cross-appeal claiming that the judgment should be varied by striking out that portion which declared Eleanor Graham to be entitled to an allowance for maintenance as aforesaid, or at all events for a longer period than six years prior to the commencement of this action.

The appeal and cross-appeal came up for argument on January 22nd, 1886.

F. Fitzgerald, for the plaintiff, referred, on the construction of the will, to *Jarman on Wills*, 5th Am. ed. vol. 2, p. 71 *et seq.*; *Doe d. Ellam v. Westley*, 4 B. & C. 667; *Anon. Moo.* 52; *Gower v. Towers*, 26 Bea. 81; *De Windt v De Windt*, L. R. 1 H. L. 87; *Jarman on Wills*, 5th Am. ed. vol. 3 p. 699; *Wilson v. Eden*, 11 Beav. 287; 12 *ib.* 454. As to precatory words creating a trust, *ib.* vol. 1, p. 680. As to estates by implication, *ib.* vol 2, p. 112, *seq.*; *Ralph v. Carrick*, 5 Ch. D. 984. On the subject of maintenance. *Simpson on Infants*, pp. 285, 288; *Re Cottrell, Joyce v. Cottrell*, L. R. 12 Eq. 566; *Grove v. Price*, 26 Beav. 103; *Dan. Ch. Prac.* 6th ed., p. 1125; *Edwards v. Durgen*, 19 Gr. 101; *Kellar v. Tache*, 1 Ch. Ch. 388; *Donald v. Donald*, 7 O. R. 669.

A. Bruce, Q. C., for Eleanor Graham, on the subject of the construction of the will referred to *Abbott v. Middleton*, 7 H. L. Cas. 68; *Bathurst v. Errington*, L. R. 2 App. Cas. 698; *Selby v. Whittaker*, 6 Ch. D. 239; *Stephens v. Powys* 1 DeG. & J. 24; *Eden v. Wilson*, 4 H. L. Cas. 257; *Greenwood v. Greenwood*, 5 Ch. D. 954; *Fenny dem. Collings v. Erwestace*, 4 M. & S. 58.

September 11th, 1886. OSLER, J.A.—This was an action brought for the purpose of administering the estate of William B. Kerns, deceased, and of declaring the construction of his will and the rights of his widow and children thereunder.

The testator died on the 15th October, 1850, having (it is said I think on the same day) made a will in the following terms: [the learned Judge then set out the will].

The testator left him surviving one son and two daughters and his widow who was then pregnant with another child who proved to be a daughter, the now plaintiff. His widow subsequently intermarried with and is now the wife of one Thomas Graham, and in January, 1880, his son William died intestate, unmarried, and without issue.

The principal question is, whether in the events that happened, the widow took a life estate under the will. It is admitted that she would have done so had the posthumous child been a son, but it is contended and has been so held by the learned Judge at the trial that as that child was a daughter, the son William at once became entitled to the whole estate subject to the payment of the legacies to the daughters, by virtue of the precatory trust in the earlier part of the will, and that the widow took no beneficial interest. The case was re-heard before a Divisional Court, by way of appeal from that decision.

I regret that we have not the advantage of a full report of the judgment below on the principal point, as, upon the best consideration I have been able to give to the case, I am of opinion that without doing violence to the language of the will, we may hold that the testator has expressed therein what, I think, no one can doubt was his intention, namely, that his widow was to take a life estate in either event, that is, whether he should have two sons or one only.

We are entitled to look at the whole of the will, to regard the instrument throughout, in order to collect the intention of the testator ; and we may also look at the sur-

rounding circumstances and see in what position he was situated in regard to his family and property. No doubt where a testator has lawfully devised in plain, clear, technical, or unambiguous language, effect must be given to his dispositions, no matter how whimsical, arbitrary, or absurd they may appear to be ; but when the will is not of that character, and the language fairly admits of two constructions, that one ought not to be adopted, which, even though it be the *primâ facie* or grammatical construction, leads to an absurd or unreasonable result, and one which looking at the surrounding circumstances, there is no reason to suppose the testator ever intended. The will in question was evidently drawn by an illiterate person. It bears the marks of haste and want of preparation. The language employed is loose and inaccurate, and the frame of the sentences involved and parenthetical. If we are obliged to read it as containing two separate and independent clauses, the first being complete in itself, and ending with the words, "the balance to my son William," I admit the difficulty, perhaps the impossibility of holding that the widow takes any beneficial interest under it, because though everything is devised to her, the words which indicate the real objects of the testator's bounty, are according to all the authorities sufficient to create a trust in their favor.

But if we give the will this construction, it leads, looking at the succeeding clause, to the apparently absurd consequence that in the one event, that, namely, of there being two sons the widow will take a life estate, while in the other, that is, of there being no change in the testator's family, or of the expected child proving to be a daughter, his widow, whom he describes (perhaps formally) as his "beloved wife," will take nothing, and no provision is made for her at all.

I think we are not obliged to adopt a construction which so entirely defeats the intention of the testator. As I read the will he meant to give his wife a life estate in any event.

He begins by devising everything to her. It is not obvious why he should have done that if in one event he meant to make no provision for her and yet to require her to deal with the property in a way which would be inconsistent with her legal rights, since, if she took nothing under the will she would at least have had her distributive share of the personalty, and her dower. Executors are appointed, and why devise to the wife at all if William was to take everything subject to the legacies to the two daughters ?

In my opinion the rest of the will is to be read as a single clause or paragraph cutting down what would otherwise be an absolute devise, to an estate for life. The words of wish and desire with which it commences dominate the whole, and everything between the words "the balance to my son William" and the concluding words of the will "at her decease" expresses parenthetically the contingency (which would seem to have just occurred to the mind of the writer) of a posthumous child. Read in this way, the words "at her decease," naturally apply to the whole clause and indicate that the son William, or the two sons, as the case might be, would take subject to their mother's life estate.

That the clause should be read as a single one may perhaps also be inferred from the fact that in the latter part of it the words "to be equally divided between them," treated as a devise to the two sons, are insensible unless read with reference to the son William in the earlier part.

On this ground I think the case is distinguishable from *De Windt v. De Windt*, L. R. 1 H. L. 87; *Doe d. Ellam v. Westley*, 4 B. & C. 667; and *Fenny dem. Collings v. Ewestace*, 4 M. & S. 58. On the general question I have referred to *Abbott v. Middleton*, 8 H. L. Cas. 68; *Jarman on Wills*, 5 Am. ed. vol. 3. p. 699; *Greenwood v. Greenwood* 5 Ch. D. 954; *Ralph v. Carrick*, 11 Ch. D. 873, 880; *ib.* 40 L. T. N. S. 505; *Re Harrison*, *Turner v. Hellard*, 30 Ch. D. (C.A.) 390, 394; *Sweeting v. Prideaux*, 2 Ch. D. 413; *Key v. Key*, 4 D'G. M. & G. 73, 84; *In re Redfern* 6 Ch. D. 133.

I do not think the payment of the legacies to the daughters is deferred until the death of the mother. It is the balance, after payment of those legacies in which she takes a life interest, and it is that which goes to the son or sons.

The judgment pronounced at the hearing should be varied in accordance with the views above expressed.

As regards the plaintiff's cross-appeal, I agree with my brother Ferguson's view, as the maintenance, if anything is to be allowed to the defendant on that head, must be deducted from the legacies or the moneys received by the tenant for life for the land expropriated by the railway company (*a*). If the other view of the construction of the will had prevailed, and the defendant had been compelled to account for the rents and profits, I think the question of allowance for maintenance must have been dealt with more liberally, and I should have thought the directions in the decree right. The actual expenditure of moneys in erecting buildings, does not seem to be complained of in the notice of cross-appeal, so that I see no reason to vary the judgment on that head beyond the insertion of the usual directions where the tenant for life has received any part of the corpus which has been converted into money.

I also agree as to the disposition of the costs.

FERGUSON, J.—This is a motion by way of appeal by the defendant Eleanor Graham, from the judgment of the learned Judge before whom the action was tried. The chief matter in dispute is as to the true construction of the last will of the late William B. Kerns who died in the month of October, 1850. The appellant who was the

(*a*) This refers to certain of the lands of which the testator had died seized, which Eleanor Graham, in her own right and as guardian for the children, had sold to the Great Western Railway Company, and the moneys for which she had received. The judgment of Proudfoot, J., declared her to be chargeable with these moneys, less the value of her dower therein, but entitled to credit for certain moneys expended by her in the erection of buildings on the land of the testator, and referred it to the Master to take an account of these matters.—REP.

widow of the testator contends, that she was and is entitled to a life estate in all the property of the testator both real and personal since the death of the testator. This has been denied her by the construction placed upon the will. [The learned Judge then set out the will as above.] Here the will ends excepting the clause appointing the executors. The testator left him surviving one son and two daughters. After his death another child, a daughter, the present plaintiff, was born. At the time of the death of the testator his children were all minors. In the month of January, 1880, the son William died intestate, unmarried and without issue leaving him surviving his mother and three sisters.

After the best consideration I have been able to give the subject I am of the same opinion, namely, that the whole of the operative part of the will should be read as one paragraph, and that the words “ (provided any more) (if a daughter) fifty pounds, and if a son then the balance after fifty pounds to each of my daughters to be equally divided betwixt them ” should be read as a parenthesis or parenthetical clause, and that by so reading the will it gives to the appellant a life estate in the real and personal property excepting what was necessary to pay the legacies to the daughters. On the argument it was stated and conceded that the contention now is in regard to real property only. I have examined, I think with some care, the authorities that were referred to as shewing that the will cannot properly be so read as to give the appellant this life estate, but I do not perceive that this way of reading it conflicts with any of them.

Reference was made to the rule that words and limitations may be transposed, supplied, or rejected where warranted by the immediate context or general scheme of the will, but not merely on conjectural hypotheses of the testator's intention however reasonable, in opposition to the plain and obvious sense of the instrument, and to the further rule that, when the words of a will are capable of a construction which will give effect to every word, it is not

within the competency of the Court to alter their collocation; but I do not see that this way of reading the will is against or in conflict with either of these rules. It seems to me to be fairly the meaning of the words employed by the testator read in the order in which he placed them. He used parenthetical marks, but as I think erroneously and insensibly. If there were no such marks at all, I see no objection to reading the clause to which I have referred as a parenthetical clause.

In the early part of the will there is a gift to the appellant. If this stood alone she would take the whole. Following this the wish and desire of the testator are expressed. These words are no doubt sufficient to create a trust, and, no doubt, there is a trust, but, as to the balance to go to the son William, it goes only at the decease of the appellant leaving her in this way a life estate in it, (this balance). I think the gift in the will is a gift to the widow, the appellant, simply cut down in this way into a life estate in this balance.

It was urged that the son William was the heir-at-law and that the inheritance could not be taken from him without express words or necessary implication. There are here express words, a gift in plain terms of what would have been the inheritance, which gift is only cut down as I have said.

The appellant, then, being entitled as I think to a life estate cannot have dower, for the two would be inconsistent, nor is she liable for rents and profits or an occupation rent. The appellant's objection as to the suit being improperly constituted by reason of want of parties falls I think to the ground, upon its being conceded that the contention is in regard to real estate only. (a) The other parts of the appeal seem to be inapplicable and unimportant when the will receives the construction above stated.

As to the cross-appeal, when the will is construed in this

(a) This refers to a clause in the notice of appeal: that the personal representatives of one of the executors of the will, who had died since the commencement of the action should be joined as parties.—REF.

way only one question is presented, namely, that in regard to the appellant being allowed for the maintenance &c., of the children.

In the case *Re Cottrell, Joyce v. Cottrell*, L. R. 12 Eq. at p. 569, Sir John Wickens, V.C., says: "When a mother maintains an infant child, although not under any legal liability to do so, she may be considered to do it under one of three views: First, with the intention of afterwards claiming the amount as a debt due to her; Secondly as an act of maternal duty, or of kindness, or as bounty, that is as a gift; or Thirdly, she may do it on an intermediate footing, that is to say, in the expectation or the hope of being recouped by means of an order for maintenance, out of some fund under the jurisdiction of the Court and which it would allow to be so applied, although such expenditure had not been previously sanctioned by the Court. But if a mother, or any other person, confers a gift intending it as a gift at the time, she cannot afterwards under a changed state of circumstances assert that, it was a loan." *Keller v. Tache*, 1 Ch. Ch. 338; *Gore v. Price*, 26 Beav. 103; and *Edwards v. Durgen*, 19 Gr. 101, may also be looked at on this subject.

The evidence in regard to the claim for maintenance &c. made by the appellant is very meagre indeed, and I think the proper way is to refer it to the Master to ascertain and state whether or not any maintenance should be allowed for, and if so, to fix the amount of such allowance in the ordinary way.

The payment of the legacies to the daughters of the testator does not seem to be postponed till the death of the appellant. They should be paid. If the claim for maintenance should be allowed there should perhaps be a set-off or a set-off *pro tanto*, and if such claim for maintenance of William be allowed, there should perhaps be such a set-off against his interest in the land or the purchase money of the same. These are matters that would perhaps be more conveniently dealt with on further directions, but in framing the judgment the proper cast can be made in respect of them.

In regard to the purchase money of the land which was received by the appellant, the tenant for life, there are the well known remedies.

The foregoing disposes, so far as I can see, of all the matters of the appeal and cross-appeal that are of any importance in the view that has been taken as to the proper construction of the will, and I think that there can be no difficulty in framing a judgment that will meet the whole case.

The appellant has succeeded as to the main contention, and she should I think, be paid her costs of the appeal by the respondents. There should be no costs of the cross-appeal. Further directions, the costs of the action and subsequent costs should be reserved till after report as they were by the judgment appealed from.

A. H. F. L.

[CHANCERY DIVISION.]

HOSKIN V. THE TORONTO GENERAL TRUSTS COMPANY.

Conversion—Railway company—Expropriation by railway company—Award—Compensation—Price of land taken, and depreciation to remainder—Who entitled to, on death of land owner—Trustee of real estate or executor.

P. being the owner of certain lands was served by a railway company with notice of expropriation and tendered a sum of money for right of way and damage, which he refused. Subsequently on the application of the company and with the consent of P.'s solicitor the County Judge made an order fixing the amount of security to be given for damages and the price of the land, and giving the company possession upon their paying the amount of such security into a bank to the joint credit of P. and the company. The money was paid in pursuant thereto. An arbitration was then proceeded with, and the compensation to be paid for the value of the land taken and the damage to the remainder, was fixed by the award in separate sums. Proceedings and appeals as to the costs kept the matter open, and the money remained to the credit of the joint account until P. died, after making his will, by which he devised all his real estate to a trustee, and appointed the plaintiff executor. The defendants were appointed trustees in place of the trustee named in the will. Upon a special case for the opinion of the Court as to whether the plaintiff as executor of the personal estate or the defendants as trustees of the testator's land, was or were entitled to the sums awarded or any part thereof. It was *Held*, that notice to treat having been given, and a claim made by the land owner, and refused by the company, and the money having been paid into Court and possession taken by the company, these circumstances under the authority of *Nash v. The Worcester Improvement Commissioners*, 1 Jur. N. S. 973, would entitle the land owner to have specific performance against the company, and that therefore the land was converted into money and the plaintiff as executor was entitled to the sums awarded.

THIS was a special case stated for the opinion of the Court under the Ontario Judicature Act of 1881, in which Alfred Hoskin as executor of Cornelius J. Philbrick was plaintiff, and the Toronto General Trusts Company who had been appointed trustees under an order of Court in the place and stead of one Mary Hoskin, to whom said Philbrick had devised his real estate, were defendants.

The case set out the proceedings that had been taken by way of arbitration between the said Philbrick, in his lifetime, and the Ontario and Quebec Railway Company, to fix the compensation to be paid by the company for certain lands which belonged to said Philbrick and which were

required for the purposes of the said railway: that on the application of the company and on the consent of the solicitors for said Philbrick, an order was made by the County Judge that \$7300 be paid into a bank to the joint credit of them both, which was done as security for the amount to be found by the award: that the award (which was made before Philbrick's death) fixed said compensation at \$3516, of which \$924 was for the land taken, and \$2592 was for depreciation to the remaining land: that before the money was drawn from the bank or paid over, certain appeals as to costs were had, during the pendency of which the said Philbrick died: that plaintiff had proved his will and defendants had been appointed trustees in place of Mary Hoskin.

The other facts material to the case are set out in the judgment.

The questions to be decided were (1) whether the plaintiff was, or the defendants were, entitled to the whole or any part of said \$3516 compensation, and (2) who should pay the costs of this case.

The case was argued on September 15th, 1886, before Proudfoot, J.

McMichael, Q.C., for the plaintiff. The land was taken by compulsion. When the order of the County Judge was made fixing the security and giving the company possession, the solicitors of Philbrick submitted to the appropriation as the order was made upon their consent. The land was then converted into money.

Edgar, for the defendants. Philbrick owned fourteen acres in all; one and a half acres were taken. The award found the value of the land taken at \$924 and the depreciation to the remaining land at \$2592 in a separate item. It is the land in the hands of the defendants which suffers to that extent by depreciation. The testator refused the offer made and declined to convert his land into money on the terms offered. The Consolidated Railway Act of 1879, 42 Vic. ch. 9 (D), shews in sub-sec. 6 of sec. 9, that the com-

pany is not responsible for the disposition of the purchase money if paid to the owner, or into Court for his benefit; and sub-sec. 29 of sec. 9 provides that the compensation is to stand in the stead of the lands taken, and sub-sec. 31 sec. 9 shews what course is to be pursued in distributing the compensation after payment in. The expropriation here was against the will of the testator, and was not his contract. I refer to *Midland Counties R.W. Co. v. Oswin*, 1 Coll. 80; *In re Taylor's Settlement*, 9 Ha. 596; *Re Horner's Estate*, 5 DeG. & S. 483; *In re Stewart, Ex p. Cramer*, 1 Sm. & G. 32.

McMichael, Q. C., in reply. There are two ways in which property becomes converted into money, (1) by contract, and (2) by assent to expropriation. The doctrine of conversion rests upon the *agreement* by the testator to sell—equity regarding that as done which has been agreed to be done—but the agreement must be clear: *Haynes v. Haynes*, 1 Dr. & Sm. 429. The depreciation of the property here took place in testator's lifetime and the damage was suffered then. The award fixed how much damage he had suffered—a claim for damages is a personal claim. The testator's solicitor consented to the order giving the company possession and fixing the security. The testator named his arbitrator to fix the amount he was to get for his land. The award was not moved against. The land was converted into money. See also *Nash v. Worcester*, cited at p. 458, in *Haynes v. Haynes, supra*.

September 21, 1886. PROUDFOOT, J.—This is a special case for the opinion of the Court under the Judicature Act.

The late Dr. Philbrick was the owner of certain lands, and on the 2nd August, 1883, the Ontario and Quebec Railway Company gave him notice of expropriation for the purposes of their railway of a portion of the lands and tendered the sum of \$3635. Dr. Philbrick refused to accept this sum. On the 10th August, 1883, upon the application of the railway company and with the consent

of the solicitors for Dr. Philbrick, the junior Judge of the county of York made an order fixing the security to be given by the railway company for compensation for the lands required by the company, and the damages that might be sustained by reason of the taking of the land at \$7300, and that upon the company paying that sum into the Bank of Commerce to the credit of the company and of Dr. Philbrick, the company might be let into the possession of the lands.

The company paid the money into the bank on the 14th August, 1883, where it has ever since remained to such joint credit.

An arbitration was then proceeded with to determine the amount of compensation, and on the 9th February, 1884, the arbitrators made their award, fixing the sum for the land taken at \$924, and for depreciation of value of remainder of the land even with an open crossing at \$2592, making in all \$3516.

The amount has not been questioned. A question however arose as to the costs of the arbitration, which the Judge of the County Court refused to allow to the company, and Mr. Justice Galt refused a mandamus to compel him to do so, a decision which was affirmed by the Court of Appeal on the 30th March, 1885. The company appealed from this decision to the Supreme Court before which it was argued on the 18th November, 1885, and judgment reserved. Dr. Philbrick died on the 2nd December, 1885, before judgment was delivered by the Supreme Court, having made a will and a codicil by which the present plaintiff was appointed an executor, and by an order of this Court the defendants were appointed trustees in the place and stead of Mary Hoskin named in the will, who declined to act. The defendants have executed a deed of the land expropriated to the railway company. The delay in Dr. Philbrick not receiving the money arose from the appeals of the railway company.

The questions asked are: 1st, Whether the plaintiff is or the defendants are, entitled to the whole or to any part

of the said sum of \$3516 and the interest thereon. 2nd, Who should pay the costs of and incidental to this special case?

The first question can be answered only by determining whether there was a conversion of the land into money under the circumstances stated above.

For the defendants it was contended that the General Railway Act of 1879, sec. 9 sub-sec. 29 declaring that the compensation for land taken without the consent of the proprietor should stand in the stead of the land, in effect determined that there was no conversion. It was also contended that a distinction might be made between the sum awarded for the land taken, and that awarded for depreciation of the remaining land which passed to the devisees.

I do not agree with either of these propositions. The sub-section 29 declares that the compensation shall stand in the stead of the land. The next sentence shews the reason for it: and any claim or incumbrance on the land shall be converted into a claim against the compensation, as against the company, so that they should be responsible for payment to a person not entitled. The statute intending evidently that the compensation should be affected by the same rights as the land. If there was an incumbrance on the land it should be an incumbrance on the compensation. If there were different estates in the land, as for life, and in remainder, so there should be in the compensation. But the statute no where says that the compensation shall be land and descend as such. The general rule of law is that by a contract for sale of land a conversion is effected. The cases to which I was referred are not inconsistent with this. It is of no importance whether the sale be made by agreement or under the compulsory powers of the Railway Act. Mr. Edgar cited *Midland Counties R. W. Co. v. Oswin*, 1 Coll. 80. The land in that case was the property of a lunatic, and the Vice-Chancellor says: "though there are no words precisely and clearly applicable to the case, it was not intended to change the nature

or quality, in point of devolution, of any man's property who was incapable of consenting."

The land had necessarily to be taken under the compulsory powers as the lunatic could agree to nothing, and it may be inferred from the language of the learned Judge, that had the owner been capable of consenting, though under the compulsion of the Act, the conversion would have been effected. The 44th section of the Railway Act in question in that case impressed the compensation with the character of real estate.

In re Taylor's Settlement, 9 Ha. 596, the land was settled upon tenants for life with remainder to children and grand children, and was taken under the London Bridge Act 4 Geo. IV. ch. 50. By the 35th section of that Act where money was paid for lands belonging to *cestuis que trust*, or limited in settlement, it was to be deposited in the bank to be applied under the direction of the Court to be invested, among other modes of application, in the purchase of other lands to be settled upon like trusts. This is similar to the 69th section of the Lands Clauses Acts, 1845. The statute in such cases impresses the character of real estate upon the compensation, and though there is no provision in such express terms in the Railway Act of 1879, it is not unlikely that the same construction would be given to sub-section 29, quoted above, where there were successive interests in the land. But where there are no successive interests in the land the case falls within sec. 76 of the Lands Clauses Act, 1845, and is converted: *Cross's Case*, 1 Sim N. S. 260. There Lord Cranworth held that even where the owner was a lunatic the property was converted under sec. 76, and the compensation money was ordered to be paid to his executors. And he distinguishes the case of *Midland Counties R. W. Co. v. Oswin*, *supra*, as depending on the special provisions in the Act then in question.

In re Horner's Estate, 5 DeG. & S. 483, the land taken was settled upon a tenant for life, and it was held that the person in remainder took the compensation money as

real estate. The Act in question was 5 and 6 Wm. IV. ch. 69, which by sec 2 directed the compensation money for lands settled to be invested in the purchase of real estate and settled to the same uses.

In re Stewart, 1 Sm. & G. 32, was also a case of settled estates, which seems to have been decided to come within the principle of sec. 69 of the Lands Clauses Acts.

Hodges on the Law of Railways, 6th ed, p. 317 says : The only principle deducible from the cases is, that where the matter comes under sec. 69 of the Lands Clauses Act, the money remains impressed with the character of real estate ; and when it comes under sec. 76, the money goes as personalty.

Re Walker, 1 Dr. 508, was also held to come within sec. 69 of the Lands Clauses Act.

In *Haynes v. Haynes*, 1 Dr & Sm. 426, Kindersley, V. C., decided that the notice to treat for the purchase of lands given by a railway company does not of itself constitute a contract, and therefore does not work a conversion. He says p. 451-2, that conversion as arising from a contract to sell is merely and exclusively the consequence of the application by a Court of Equity of the doctrine of specific performance. When there can be no specific performance there can be no conversion. And at p. 457, quoting a proposition of Lord St. Leonards that it is now a settled point that a sale to a railway company of land for a proposed railway may be enforced in equity like any other contract for sale of land, he examines the cases upon which it is based, and shews that in one of them there was a special agreement between the company and the land owner, and not a case of a notice to treat which had never been given ; and in the other, *Nash v. Worcester Improvement Commissioners*, 1 Jur, N. S. 973, notice had been given, but beyond that the land owner sent in a claim for £960. The parties not agreeing, the question of amount was submitted to a jury, who awarded £750. The commissioners never paid the money, but entered into possession. The bill was for specific performance, and specific

performance was decreed, and the Vice-Chancellor concludes that Lord St. Leonards only intended to lay down if there be an actual sale by the land owner to the company, whether arising out of a notice to treat or not, such sale may be enforced in equity like any other contract for sale of land.

In the present case the notice to treat was given, a claim made by the land owner, refused by the company, money paid into Court, and possession taken by the company, these circumstances under the authority of *Nash v. The Worcester &c., supra*, would entitle the land owner to have specific performance against the company, and the result follows that conversion is effected.

The plaintiff is entitled to the costs of this special case.

G. A. B.

[CHANCERY DIVISION.]

RE BOUSTEAD AND WARWICK.

Vendor and Purchaser—R. S. O. ch. 109, sec. 3—Solicitors abstract—Paper title—Title by possession—Declaration evidence—Affidavit evidence—Vivâ voce evidence—Title by decree—Specific performance.

B. agreed to sell certain land to W., and in the agreement it was provided that "the examination of title to be at the expense of the purchaser who is to call for only those deeds and papers in my possession or under my control." W. demanded a solicitor's abstract which B. declined to furnish; and on the examination of the title it was discovered that a deed was missing which had not been registered, so that a clear paper title could not be made out. B. then offered evidence of a title by possession by declarations under 37 Vic. ch. 37, (D.), which W. declined to accept.

Held, on an application under the Vendor and Purchaser Act, R. S. O. ch. 109, sec. 3, that B. was bound to furnish an abstract, and that W. was not bound to accept declaration evidence of the title by possession, and the vendor was directed to obtain affidavits from the declarants, when the purchaser could cross-examine the deponents, and if not satisfied with that, although he might be thought unreasonable, the purchaser was entitled to have the evidence taken *vivâ voce*, and have his title sanctioned by a decree, in which case, and for that purpose leave was given to him to institute a suit for specific performance, all costs of which were reserved until the hearing.

THIS was an application under the Vendor and Purchaser Act, R. S. O. ch. 109, in reference to house and lot number 24, Bloor street, in the city of Toronto, and county of York.

The petition was filed by J. B. Boustead as vendor against Guy F. Warwick as purchaser, and set out that a good paper title to the property in question could not be made, and the vendor desired to force a title by possession on the purchaser by evidence of the same embodied in declarations under 37 Vic. ch. 37 (D.), which the vendee refused to accept, and that the vendor declined to furnish a solicitor's abstract, because his agreement for sale provided that "the examination of title to be at the expense of the purchaser, who is to call for only those deeds and papers in my possession or under my control."

The petition came on for argument on September 15th, A. D. 1886, and was heard before Proudfoot, J.

Mills, for the vendor. The purchaser is not entitled to a solicitor's abstract or in fact to any kind of an abstract from the vendor, as under the agreement he can only call for those deeds and papers in vendor's possession. "Papers" covers an abstract. [PROUDFOOT, J.—I don't think so. I have no hesitation in saying you must give an abstract.] The purchaser declines to take declarations as evidence of title, and contends that the vendor must go into Court and prove title by possession. No Court would ask a vendor to do that. A voluntary affidavit is not as good as a declaration under the statute: *Lees's Abstracts of Title*, 359. A possessory title can be forced on a purchaser, and can be proved with less than the strictest evidence: *Gaines v. Bonnor*, 33 W. R. 64; *Re Bell*, 3 Ch. Ch. 254.

W. M. Hall, for the purchaser. There is no dispute here as in *Scott v. Nixon*, 3 Dr. & W. 388, and *Gaines v. Bonnor*, *supra*. I admit a title by possession may be forced on a purchaser, but evidence by declarations of that title is not sufficient unless the purchaser is willing to accept it, and then it must be of the strictest kind. To make a title by prescription * * the evidence should be clear, strong, and satisfactory * *. Unless the evidence for this purpose is clear, it should be given *vivâ voce* and before a Judge: *Re Caverhill*, 8 U. C. L. J. N. S. 50. [PROUDFOOT, J.—But that was under the Quieting Titles Act, and the evidence should be particular and strict, as the title is made good against the world. A good holding title might, however, be made without being so strict.] Before the Court will force a title by possession on a purchaser the evidence must be taken in Court, where a proper cross-examination of the parties can be had. I refer to *Dart on Vendors and Purchasers*, 5th ed. 401; *Scott v. Nixon*, 3 Dr. & W. 388; *Gaines v. Bonnor*, 33 W. R. 64.

September 21, 1886. PROUDFOOT, J.—Case under the Vendor and Purchaser Act, R. S. O. ch. 109, sec. 3. The vendor agreed to sell, and one of the terms of the agreement was "The examination of title to be at the expense

of the purchaser, who is to call for only those deeds and papers in my possession or under my control."

Upon examination it was ascertained that one of the deeds in the chain of title had not been registered, and the deed itself could not be found. The vendor then claimed that he and those under whom he claimed had been in possession for more than twenty years, and had obtained a title by possession. And he procured declarations to that effect under 37 Vic. ch. 37 (D.)

Two questions were submitted:

1. Whether the vendor has made out a good title by possession to the property by the evidence tendered to the vendee.

2. Whether under the agreement the vendor is bound to give a solicitor's abstract.

Upon the argument I held that the vendor was bound to give a solicitor's abstract.

Upon the other question, the counsel for the purchaser, while admitting that a title by possession may be forced upon a purchaser, contended that the evidence afforded by declarations was not sufficient, and that he had no means of cross-examining the declarants.

The Statute for the suppression of voluntary oaths, 37 Vic. ch. 37 (D.), though it renders the person making a false declaration guilty of a misdemeanor, does not make the declarations evidence. And it is obvious that such declarations are not of such value as evidence under oath, for though the civil penalty for a false declaration is the same as for perjury, yet it wants the sanctity of the oath. A man might be ready to run the risk of punishment for a misdemeanor who would not be willing to offend the Almighty by deliberate perjury.

Title by possession can only be proved by the evidence of witnesses. And when title is being examined by counsel out of Court it is probable that these declarations would generally be accepted as sufficient proof of possession. The rule in practice is not, without sufficient cause, to require the formal evidence, which would be necessary

in an action : *Sugden* V. & P., 14th ed., 417. In the present case there is no suggestion of any reason for doubting the truth of the declarations.

But in a purchase of this magnitude, about \$9000, I cannot say that the purchaser is too exacting in requiring the best evidence that can be had to establish the title. As his counsel rested his objection chiefly on the ground that the evidence was not under oath and not subject to cross-examination, this objection may be obviated by directing the seller to procure affidavits from the declarants, which will no longer be obnoxious to the charge of being voluntary, when the purchaser can cross-examine the deponents. If not satisfied with this, though I may think him unreasonable, the purchaser is entitled to have the evidence taken *vivâ voce*, and have his title sanctioned by a decree. In that case I give the seller leave to institute a suit for specific performance, as without this there would seem to be some doubt whether he could do so after taking proceedings under the Act; and all the costs will be reserved to be dealt with by the Judge at the hearing.

If the purchaser will be satisfied with affidavit evidence and the seller establishes his title, there should be no costs to either party, if he fail to prove title the seller should pay costs.

G. A. B.

[CHANCERY DIVISION.]

POWELL v. PECK ET AL.

*Mortgage—Rate of interest—Payment into Court—Court rate of interest—
Rate of interest after maturity of mortgage—Contract or damages.*

A mortgage contained the following proviso for repayment: “\$3,000, with interest at eight per cent. per annum, the principal sum to be paid as follows” (in sum of \$1,000 yearly) * * “with interest at the rate aforesaid on the whole unpaid principal payable half yearly * * until payment in full, to be computed from the 1st day of June, instant, with interest at the same rate on all overdue payments of interest.”

During certain proceedings on the mortgage in which the mortgagor disputed his liability to pay the balance due on the mortgage, the money was paid into Court where it remained for some six years, when it was paid out to the mortgagee who had succeeded in establishing his right to it. The Master in taking the accounts between the parties allowed no interest on the money paid in, the mortgagee having received the Court rate, and he allowed interest on the mortgage after its maturity at the rate therein provided up to the time appointed by the Court for payment, and certified that he allowed it as a matter of contract and not as damages. On appeal and cross-appeal from both of these findings, it was

Held, following *Sinclair v. The Great Eastern R. W. Co.*, L. R. 5 C. P. 391, that the mortgagor should pay interest on the sum paid into Court beyond the Court rate, and following *St. John v. Rykert*, 10 S. C. R. 278, that eight per cent. (the rate provided for) was not payable after the maturity of the mortgage, from which time the legal rate only was recoverable. *McDonald v. Elliott*, 12 O. R. 98, referred to and distinguished.

THIS was an appeal and a cross-appeal from a report of the Master in Ordinary.

It appeared that the suit of *Powell v. Peck* was a suit on a mortgage which was given as part payment for a patent right, and the suit of *Peck v. Powell* was a suit to have Powell declared a trustee for Peck of a renewal of a patent right in which an injunction was asked to restrain Powell from negotiating the patent, which was part of the consideration for the mortgage.

The result of the motion for the injunction was that the money, \$735, balance of an overdue instalment on the mortgage, was paid into Court in September, 1878, and remained there until April 27, 1886, when it was paid out to Powell who had succeeded in his suit in getting a decree for sale.

In taking the accounts the Master had allowed no interest to Powell on this \$735, but left him to collect the Court rate allowed at four per cent., although the mortgage bore interest at eight per cent. The Master had also allowed plaintiff interest on his mortgage at the rate of eight per cent. up to the 22nd of December, 1886, the time appointed for the payment, although the mortgage matured on June 1, 1880, and he certified that he did so by virtue of the terms of the contract in the mortgage and not by way of damages.

From the first of these findings the plaintiff appealed, and the defendants appealed against the second.

The appeals were argued on September 23, 1886, before Proudfoot, J.

Delamere, for the plaintiff's appeal. The point in dispute is, who is to pay the difference between the Court rate four per cent., and the mortgage rate eight per cent. on the money paid into Court as the Master could not distinguish this case from *Small v. Attwood*, 3 Y. & C Ex. 105. [PROUDFOOT, J.—That point was decided some years ago: *Nichols v. McDonald* (not reported.)] In *Small v. Attwood*, *supra*, there was no contract to pay interest on interest, and it was interest that was paid into Court in that case. Payment into Court is not payment to a party. The defendants' conduct prevented the plaintiff getting the money that he was rightfully entitled to.

In the cross-appeal the question is, does the wording of the proviso for payment come within *St. John v. Rykert*, 10 S. C. R. 278? The words there were, "with interest thereon at 24 per cent. per annum until paid." The words here are, "until payment in full," and all overdue interest bears interest. I refer to the cases collected in *Fisher on Mortgages*, 4th ed., 879. In *Re Roberts*, *Goodchap v. Roberts*, 14 Ch. D. 49; *Ex p. Furber*, 17 Ch. D. 191; *Wallington v. Cook*, 47 L. J. Ch. 508; *Dalby v. Humphrey*, 37 U. C. R. 514; *Royal Canadian Bank v. Shaw*, 21 C. P. 455.

Beck, contra. The order for payment into Court of the money was made on Powell's consent. Peck was asking an injunction in his suit in which he ultimately succeeded, and Powell agreed to allow it to go if the money was paid in, so his action forced Peck to pay it in. On principle, outside of authority, he should lose the difference in the interest as he should not have opposed the injunction which Peck was entitled to in any event. *Small v. Attwood, supra*, should govern this case. The language of the Chief Baron is very strong at p. 137. [PROUDFOOT, J.—You kept Powell out of the money he was entitled to, and it would be rather hard if he did not get the interest he contracted for.] No, he kept my client out of it by compelling him to put it in Court. [PROUDFOOT, J.—The money was his, and you should have paid it to him.]

As to the cross-appeal I rely on *St. John v. Rykert, supra*, and refer to *Brewer v. York* 20 Ch. D. 669. The words in the proviso "in each year" mean the years referred to in the mortgage. "Payment in full" means until the last day fixed for payment. The words in *St. John v. Rykert, supra*, "until paid", were much stronger than the words here.

If the contract is only to be construed to the date of payment, then it is a matter of damages. See *Cook v. Fowler*, L. R. 7 H. L. 27. *Dalby v. Humphrey* 37 U. C. R. 514. The Master does not give the interest as damages.

If the contract was at an end then six per cent. is the measure of damages. The rate is absolutely assigned by statute. See judgment of L. C. Cairns in *Cook v. Fowler*, L. R. 7 H. L. at p. 35.

The proper measure of damages for non-payment on the day is the rate of interest fixed by the parties themselves before the day, if the rate named was below the five per cent., but there is no authority that more than five per cent. will be given by way of damages: *Per Jessel, M. R., in Re Roberts, Goodchap v. Roberts*, 14 Ch. D. 49 at p. 51. In this country six per cent. is the same as five per cent. in England. There is no compound interest after the date

fixed for payment, *Wilson v. Campbell* 8 P. R. 154. See also *Popple v. Sylvester* 22 Ch. D. 98.

Delamere, in reply. In *St. John v. Rykert*, *supra*, Mr. Justice Strong said at p. 288, "That in the absence of express words showing that the parties contemplated payment, not *ad diem* but *post diem*, we ought not to assume that they intended to make provision for a breach of covenant." Here the parties did contemplate payment *post diem* by providing for payment of interest on interest overdue.

September 29th, 1886. PROUDFOOT, J.—Two questions were discussed in this case. 1st, Whether a mortgagor, who had paid money into Court, secured by the mortgage, pending a suit to have it declared that he was not liable to pay the mortgage, and which was decided against him, should pay interest beyond the interest allowed by the Court; and 2nd, Whether the mortgagee could recover 8 per cent., the rate of interest secured by the mortgage, after the time for payment mentioned in the mortgage had elapsed.

Both questions are covered by authority.

In *Sinclair v. The Great Eastern R. W. Co.*, L. R. 5 C. P. 391, a judgment had been recovered against the defendants on 9th September, 1869, for a large sum awarded by an arbitrator, and costs. On the 26th October, an order was made to stay proceedings till the 5th day of Michaelmas term to give the defendants an opportunity to move to set aside the award, they bringing the money into Court to abide the event, and on the 8th November, the motion was made but no rule granted. The taxation of the plaintiff's costs was not finally completed till 29th January, 1870, and the plaintiff claimed interest till 2nd July, the day when the money was paid out.

The statute makes a judgment bear interest at 4 per cent. until satisfied. It was held that the plaintiffs were entitled to interest, on the money paid into Court till the 8th November, the time when they might have taken it out.

In the present case the mortgage money bears interest by virtue of the covenant in the mortgage, and the plaintiff Peck paid it into Court, as the price of getting a stay of proceedings till he contested the right of the defendant to the money. The defendant Powell could not get the money out of Court till the determination of that proceeding. He was kept out of the use of the money by the unsuccessful contention of the defendants, and both on principle and authority, it seems to me the plaintiff Peck ought to pay interest beyond the Court interest.

The proviso for redemption in this case upon the mortgage, dated the 1st June, 1877, is that the mortgage is to be void on payment of \$3,000, with interest at eight per cent. per annum. The principal sum to be paid as follows: \$1,000 on the 1st of June, 1878, \$1,000 on the 1st of June, 1879, and \$1,000, on the 1st of June, 1880, with interest at the rate aforesaid on the whole unpaid principal payable half yearly on the first days of December and June in each year until payment in full, to be computed from the first day of June instant, with interest at the same rate on all overdue payments of interest.

I am unable to distinguish this from *St. John v. Rykert*, 10 S. C. R. 278-288. In that case the proviso was: "The said sum of \$3,000 on the 11th day of July, 1862, with interest at the rate of 24 per cent. per annum until paid." Strong, J., says: "In the absence of express words shewing that the parties contemplated payment, not *ad diem* but *post diem*, we ought not to presume that they intended to make provision for a breach of the covenant; and I should have thought that a proper and salutary construction requiring as it does parties who stipulate for a larger amount of interest than the usual and legal rate to make clear by precise and unambiguous language what their intention was." And he then says that the point was covered by authority, referring to the case of the *European Central R. W. Co.*, 4 Ch. D. 33. The expression here, *until payment in full*, is of no higher force than *until paid*. And the clause as to interest on overdue payments of interest,

is fully satisfied by gales of interest in arrear during the time fixed for payment of the principal.

In conformity with that authority I must hold that eight per cent. was not payable after the 1st of June, 1880: after that time only the legal rate is recoverable.

As each party succeeds in part, there will be no costs: *Small v. Attwood*, 3 Y. & C. Ex. 105, does not seem to apply to this case. It was a suit for specific performance and the payments into Court were payments of interest.

From the case of *McDonald v. Elliott*, 12 O. R. 98, it seems that interest at the rate reserved after the money was payable might have been allotted to the mortgagee by way of damages; but the Master has expressly found that he has allowed the interest to the plaintiff Powell up to the day fixed by him for payment at the rate specified in the mortgage, by virtue of the terms of the contract, and not by way of damages.

G. A. B

[CHANCERY DIVISION.]

THE MERCHANTS BANK OF CANADA V. MCKAY, ET AL.

Mortgage—Security for indebtedness—Sureties—Change of original securities—Forgery—Release of sureties.

K. & Co. were customers of the plaintiffs and gradually accumulated a liability of about \$26,000, to secure which the defendants gave a mortgage containing a recital that the plaintiffs had agreed to make further advances to K. & Co. on receiving security for the then present indebtedness, and a redemption clause providing for payment of all bills, notes, and paper, upon which K. & Co. were then liable together with all substitutions and alterations thereof and all indebtedness in respect thereof, the same being a continuing security. The bank did business with K. & Co. in two different ways, one by discounting K. & Co's. customers' notes, in which case their rule was to notify the customers that they held their notes, and another by discounting K. & Co's. own notes and taking their customers' notes as collateral, in which case they always got the collateral notes to an amount exceeding the advance, but did not notify the customers.

At the time the mortgage was given all the notes held by the bank were believed to be genuine, and the discount of the customers' paper very largely exceeded the discount of K. & Co's. notes. K. & Co. suspended two years later. At the time of the suspension it was discovered that by renewals and substitutions nearly all the notes at the date of the mortgage had been replaced by K. & Co., in renewals and substitutions by forgeries, and that the amount of the discounts of K. & Co's. notes secured by the collaterals very largely exceeded the discounts of the customers' notes. In an action by the bank to foreclose the mortgage the mortgagors claimed that they, as sureties, were discharged by the bank's action.

Held, that the bank parted with genuine and received fabricated securities, and through its laches or default necessarily worked prejudice upon the rights of the sureties; that of two innocent parties of whom one must suffer on account of the fraud or crime of a third, the one most to blame by enabling the wrong to be committed should bear the loss, and the defendants were exonerated from liability in so far as they were prejudiced by the conduct of the bank.

Primâ facie the bank were liable to the extent of the face value of the securities surrendered, but they were at liberty to reduce such amount by evidence as they might be advised.

THIS was an action to foreclose a mortgage made by William McKay, Alexander McKay, and John McKay, to the plaintiffs to secure the indebtedness of the firm of Messrs. Kyle & Co.

The action was tried at the Toronto Sittings, on May 11th and 12th, 1886, before Ferguson, J.

Rae, for the plaintiffs.

Moss, Q. C., and *Stewart*, for the defendants.

It appeared that Kyle & Co. were customers of the bank and on December 20th, 1883, the date of the mortgage, were indebted to the bank in the sum of \$26,513.04, and the mortgage in question was given as security to the bank. The mortgage contained the following recital: "Whereas, the firm of William Kyle & Co., composed of * * are indebted to the mortgagees in the course of banking for debts contracted by the said firm to the said mortgagees, and for which the said mortgagees now hold the commercial paper of the customers of the said firm, upon which the said advances have been made, and the said firm have applied to the said mortgagees for additional advances for a limited period to which the said mortgagees have agreed upon receiving security for the present indebtedness, and it is intended by these presents to carry out such agreement."

The redemption clause was in the following words: "Provided, the mortgage to be void on payment of \$26,513.04 in two years from the date hereof, and all bills of exchange, promissory notes and other paper upon which the said firm of Wm. Kyle & Co. were liable to the said mortgagees, on the twenty-fourth day of November, A. D., 1883, together with all renewals, substitutions and alterations thereof, and all indebtedness of the said firm to the said mortgagees in respect of the said sum, this indenture being intended to be a continuing security to the said mortgagees for the above amount, notwithstanding any change in the membership of the said firm, either by death, retirement therefrom, or addition thereto, and also to secure and cover any sum due or to become due in respect of the interest, commission upon the said notes or renewals, or other commercial paper."

The bank had made advances to Kyle & Co., in two ways, one by discounting their customers' paper, and another by discounting Kyle & Co.'s own notes and taking a deposit of their customers' notes as collateral, in which latter case there was always a margin of collaterals over the amount advanced. At the time the mortgage was given the bank

held notes to the full amount, perhaps more than the \$26,513.04, for which the mortgage was given. Kyle & Co. suspended in September, 1885, and after the suspension it was discovered that in the ordinary course of business the indebtedness of the firm had been increased to about \$60,000, and that by renewals and substitutions for the original notes, the larger part of the notes then held by the bank as collaterals, were forgeries.

On this state of facts the defendants claimed that as they were only sureties for Kyle & Co.'s liability at the time of the making of the mortgage, and that as the bank had delivered up the genuine paper then held, and had allowed invalid paper to be substituted therefor, that they were released.

At the conclusion of the evidence it was agreed by the counsel for all the parties with the consent of the learned Judge, that the argument should be had before the Divisional Court at its next sittings.

The argument therefore subsequently took place before the Divisional Court on September 6, 1886, before Boyd, C., and Proudfoot, J.

Rae, for the plaintiffs. The evidence and recital in the mortgage shews the mortgage was not confined to the then indebtedness, but was given for a continuing indebtedness. The defendants are liable either as principals under their direct covenant to pay, or as sureties who were bound to see the bank paid. It was not the duty of the bank to see to the payment of the debt, and it was the duty of the sureties to see that Kyle & Co. gave the bank good and proper notes in cases of renewals, &c. [PROUDFOOT, J.—Was it not the duty of the bank to see that if they gave up good paper, that they got good paper in return?] No, not unless the default was wilful on the part of the bank, and in *MacTaggart v. Watson*, 3 Cl. & F. 525, it was held that the surety was not discharged by the neglect of the Commissioners, who there occupied the same position as the bank here, in detecting the fraud. The defendants are

principals and not sureties, and even if they were sureties, they were not discharged. In *Ritter v. Singmaster*, 73 Penn. St. R. 400, forgeries were substituted for good paper, and the parties were held liable on the original note as it was not paid. [BOYD, C.—But are the defendants still liable here as the customers have paid Kyle & Co.?] Kyle & Co. are not discharged yet, and the mortgage was given to secure their debt: *Merchants Bank v. Bostwick*, 3 A. R. 24. If the debt is not paid in full, whether it is represented by notes then in existence, or renewals, or notes given in substitution therefor * * the mortgage should remain in full force: Per Gwynne, J., at pp. 468 and 469: *Merchants' Bank v. Bostwick*, 28 C. P. 450. Mere negligence even if gross, on the part of a creditor, unaccompanied by positive acts of concurrence in the defalcation of the debtor, will not discharge the surety: *Madden v. McMullen*, 13 Ir. C. L. R. 305.

Moss, Q. C., and *Stewart*, for the defendants. Under the terms of the mortgage and under the facts the mortgage is not only satisfied by payment, but the dealings of the bank with Kyle & Co., have released the sureties. It is a mere matter of account to settle the first. This case is not like *Cameron v. Kerr*, 3 A. R. 30, or *Merchants Bank v. Moffatt*, 5 O. R. 122, as the security was given for a present indebtedness. The evidence shows that the bank has received large sums of money which should be credited on the original debt: *Clayton's Case*: *Tudor's* Leading Cases on Mercantile Law I. The evidence also shows that at the time the mortgage was given the bank held \$21,745 of customers' genuine notes endorsed by Kyle & Co., and Kyle & Co.'s notes, secured by a deposit of customers' notes as collateral, to an amount over \$5,000. The bank's rule was to notify customers when they discounted their notes, but they did not do so when the notes were held as collateral security. They then changed Kyle & Co.'s account in such a manner that at the time of the suspension (besides the debt having increased to \$60,000) the amount of the notes held as collateral, were largely in

excess of those discounted—perhaps in the proportion of eighty to twenty. In that way the bank aided Kyle & Co. to place the invalid notes, because being held as collateral the makers were not notified, and were not aware of what was being done, and the fraud was not discovered until it was too late. That course of action discharged the defendants. [BOYD, C.—Only to the extent of the lost security.] No, it has operated as a complete discharge, for that we rely on *Polak v. Everett*, 1 Q. B. D. 669, as opposed to *Wulff v. Jay*, L. R. 7 Q. B. 756. [BOYD, C.—There is a case of *Capel v. Butler*, 2 S. & S. 457, in which that point was considered.] The course of dealing and the relationship between the parties were changed and so destroyed the whole liability. In *MacTaggart v. Watson*, 3 Cl. & F. 525, and *Madden v. McMullen*, 13 Ir. C. L. R. 305, the security was given for a person in office, and a surety in such a case cannot relieve himself by giving notice and leaving the person in office. Here the sureties were entitled upon payment of the debt, to have all the securities handed over at the time of the payment of the debt.

Rae, in reply. The bank did not alter their course of dealing, but tried by getting the collaterals on all of which there was a margin over the advances to reduce the chance of loss and strengthen the security. [BOYD, C.—But by the old dealing they would have found out sooner.] They might have done so, but even that is not sure, and even if it was so, it was not such gross negligence as would discharge the sureties. In answer to the case of *Polak v. Everett*, cited, *supra*, by Mr. Moss, I refer to *Carter v. White*, 25 Ch. D., 666. I also refer to *Coombes v. Parker*, 17 Ohio, 289 ; *Laurie v. Scholefield*, L. R. 4 C. P. 622.

September 22, 1886. BOYD, C.—Upon the question argued before us, I am of opinion that the contention of the sureties is entitled to prevail. At the time they entered into the mortgage security now being enforced by the bank the principal debtors, Kyle & Co., had deposited with the bank a large quantity of negotiable paper of their custom-

ers as collateral security. The bank from time to time dealt with Kyle & Co. in respect of this collateral paper, taking what purported to be renewals of it, or substitutions for it so as to keep their account active. But by criminal practice on the part of the acting member of that firm, the great bulk of this substituted paper has been forged, so that in fact, but some two thousand dollars worth of good collateral securities now remain in the hands of the chief creditors, the bank. The bank have been deceived by the firm of Kyle & Co., but of this the sureties had no notice, and they in no way connived therein. Although no case of this precise kind is to be found in the books, I think the principles governing the law of suretyship extend to such a state of circumstances. It is well settled that property taken from the principal as security for the debt, is to be held by the creditor for the benefit of the surety, as well as himself, and is held by him in trust for his own security, as well as for the surety's indemnity. If he parts with it, without the knowledge and against the will of the surety, he shall lose his claim against the latter to the amount of the property surrendered: *Baylies*, p. 238.

In this case the sureties assented to the necessary alteration and substitution of commercial paper for that originally held as collateral, which would arise in the ordinary course of dealing with the bank, and which imported that the bank was to do the best it could for its own protection, having regard, of course, to the right of subrogation vested in the sureties: *Rainbow v. Juggins*, L. R. 5, Q. B. D. 423. Here the bank parted with genuine, and received instead fabricated securities, and through its laches or default necessarily worked prejudice to a greater or lesser extent upon the rights of the sureties. *Wulff v. Jay*, L. R. 7 Q. B. 756, and *Polak v. Everett*, 1, Q. B. D. 669, in commenting upon *Wulff v. Jay*, both recognize that if specific property which the surety has a right to have made available to him is lost by reason of the act or default of the principal creditor, he is entitled to be re-

lieved to the extent or value of the property so lost. It cannot be said here that the securities have become worthless, without fault on the part of the bank. If the case even be regarded as that of two innocent parties, of whom one must suffer on account of the fraud or crime of a third, then, according to the usual rule in such case, the party who is most to blame by enabling the wrong to be consummated, shall have to bear the loss. Analogous cases have arisen where persons in a fiduciary position have lost parts of the trust estate by means of frauds and forgeries practised upon them, by those in whom they had confidence, and the cases have settled into uniformity in holding that the loss cannot be cast upon the estate, but must be borne by the trustee personally. One of the most recent I have seen is *Sutton v. Wilders*, L. R., 12 Eq., 377, where the Master of the Rolls says: "If it be said that the loss was caused by forgery, and that no precaution would have prevented it, then I have held that when a forgery is committed upon any person, the loss must fall on him, whether he be the principal or trustee; and this view of mine has, I believe, been affirmed by the House of Lords in the case of a forgery upon one of the railway companies: *Midland R. W. Co. v. Taylor* 8 H. L. C. 751."

I do not think it is a case for exonerating the sureties from all liability, but only in so far as they have been prejudiced by the conduct of the bank. For this purpose as well as for taking the other accounts mentioned during the argument, it will be referred to the Master. *Primâ facie* the bank is liable to the extent of the face value of the securities surrendered and it will be for the bank to reduce this by evidence as advised. And at present it will be better to reserve all costs and further directions.

PROUDFOOT, J.—I agree with the judgment of the Chancellor just delivered.

G. A. B.

[CHANCERY DIVISION.]

RE SIMMONS AND DALTON.

*Electoral Franchise Act—Revising officer—Mandamus—Notice to voter—
Notice to Revising officer—Jurisdiction of Provincial Courts to issue
mandamus.*

A Revising Officer under the *Electoral Franchise Act*, 48 and 49 Vic. ch. 40, (D.) having declined to entertain the application of S. to have the name of D. struck off the voters' list on the ground that the notice to D. provided for by sec. 26 of the Act was not proved, and that the notice to the Revising Officer provided for by same section was not duly served on or given to him in time; on an application for a mandamus to the Revising Officer, although it appeared no copy of the notice to D. was kept, and no notice to produce the original was served, it was shewn by two witnesses that a notice to D. filled up on a printed form with his name, address, and the objection to his vote had been mailed to him by a prepaid registered letter on June, 26th, for the sittings of the Revising Officer on July 12th following, and the certificate of registration was produced, although the witnesses had no distinct individual knowledge of the particular notice to D., and that such evidence had been given before the Revising Officer.

Held, that in the absence of evidence to the contrary such proof was sufficient.

The notice to the Revising Officer was left with his clerk at his office during the absence from town of the Revising Officer on Monday, June 28th, and on his return on the afternoon of that day he was told what had been done, and that if he did not consider that sufficient the notice would be procured again and served on him personally, but he said what was done was sufficient.

Held, that the last day for service for the sittings for the final revision to be held July 12th was Sunday, June 27th, but that under sec. 2, sub-sec. 2, of the Act, the time was extended, and S. had all the next day, and that the notice was well given on Monday.

Held, also, that the service of the notice on the clerk of the Revising Officer was, under secs. 19 and 26, a sufficient "depositing with" the Revising Officer to satisfy the statute, and the conduct of the Revising Officer amounted to an adoption of the action of the clerk, and was equivalent to personal service if such were required by the statute.

It was contended that the Revising Officer was an appointment of the Dominion Government, and that his sittings were sittings of a Court of Record, and that there was no jurisdiction in a Provincial Court to issue a mandamus to him.

Held, that the Dominion Parliament had, by the Electoral Franchise Act, interfered with civil rights in this Province, and having made no provision for a Court to superintend the conduct of the officials, and following *Valin v. Langlois*, 3 S. C. R. 1, that until such a Court is created the Provincial Courts by virtue of their inherent jurisdiction have a right to superintend the discharge of their duties by any inferior officer or tribunal.

Held, also, that the Revising Officer erred in point of law in assuming that the notice to him required personal service, and that it was too late, and in holding that notice to produce the notice to D. should have been given which were not findings of fact, and such mistakes or errors

are not such decisions as prevent the granting of the writ of mandamus. If he had found as a matter of fact that notice was not given to D., there might have been some difficulty in interfering with his conclusion. *The Centre Wellington Case*, 44 U. C. R. 132, referred to and distinguished.

THIS was an application on behalf of one James K. Simmons, for a writ of mandamus to compel a Revising Officer to hold a Sittings and adjudicate upon a complaint made by said Simmons to have the name of one William G. Dalton struck off the voter's list.

The Revising Officer had declined to entertain the complaint on the ground that the notice to Dalton provided for by The Franchise Act, 48 & 49 Vic. ch. 40, sec. 19 (D.), had not been sufficiently proved, and that the notice to the Revising Officer provided for by the same section had not been duly served or given in time.

The motion was heard on September 14th, 1886, before Proudfoot, J.

Aylesworth, for the application.

Osler, Q.C., and *O'Neill*, contra.

It was objected that the sittings of the Revising Officer was a Dominion Court of Record, and that there was no jurisdiction in the High Court to control him by mandamus; but it was finally agreed by counsel for both sides, with the consent of the learned Judge, that the motion should be argued to ascertain if it was a proper case for a mandamus to go, and if so, the question of jurisdiction should be argued on a subsequent day.

Aylesworth. This is a proper case for a mandamus. The evidence, which, on this point is not contradicted, shows that Dalton's name should not be on the list, as he has sold the property on which he qualified, and the objection must be made now as it cannot be taken advantage of at the poll, as the oath a voter may have to take at the poll says nothing about qualification. The proof of the posting the notice to Dalton in a registered letter, posted on June

26th, was sufficient for the sittings to be held July 12th, although no copy of it was kept, and although the witnesses could not swear to the exact words, for they testified to its general effect, and there could be no reasonable doubt of what it was. Then, the notice to the Revising Officer was also sufficient. It was delivered to his clerk, Mr. Hughes, at the Dominion Franchise Office in Chatham, while the Revising Officer was absent from town on June 28th, and on his return during the afternoon of that day he was informed by Simmons's agent of what had been done, and told that if he did not consider that sufficient the notice would be procured again and served on him personally, but he said what was done was sufficient. Section 54 of the statute constitutes the clerk's office with a recognized position, and he is to perform such duties as are assigned to him by the Revising Officer. [PROUDFOOT, J.—Is it denied that Hughes was the clerk?] *Osler, Q. C.* Oh, no. I admit that.

Aylesworth. Section 19, provides that the notice is to be "deposited with" the Revising Officer "at his office" or mailed, which is different in the case of the person objected to, who must have notice "delivered to" him or mailed, &c. The sitting was to be held on Monday, July 12th, so that Sunday was two weeks before, but under sec. 2, sub-sec. 2, Simmons had all the following day to do the act, and was consequently in time. If that was not so, a Revising Officer could at any time take a day off the necessary two weeks by holding his sitting on a Monday. The attitude of Dalton entitles applicant to costs. In *Re Dean v. Chamberlin*, 8 P. R. 303. As to the mandamus see *Re Allan*, 10 O. R. 110.

Osler, Q. C., and O'Neill. There was evidence of a letter sent but not of its contents, No copy was kept and no notice to produce was given. The Revising Officer was the Judge as to whether the notice to Dalton was proved, and he has found in the evidence that it was not, and the Court here will not interfere with that. The notice to the Revising Officer was not given to him, and was too late as well.

[PROUDFOOT, J.—Surely the Act must be given a more liberal construction than that !] *Osler, Q. C.*—Liberality comes in when jurisdiction is established, which I contend does not exist here. Sections 19 and 26 together settle the time. It must be at least two weeks. There should be no mandamus. We refer to *Nicholls v. Cumming*, 1 S. C. R. 395; *Noseworthy v. The Overseers of Buckland-in-the-Moor*, L. R. 9 C. P. 233; *Queen v. The Court of Revision of the Town of Cornwall*, 25 U. C. R. 286.

Aylesworth in reply. "Deposit with," does not mean personal delivery to. Leaving the notice where the Revising Officer had control of it was sufficient, and that was done here. There was no necessity of proof of every word in the notice to Dalton.

September 21st, 1886. PROUDFOOT, J.—This is a motion on behalf of James K. Simmons for an order that a writ of mandamus issue directed to Robert Stuart Woods, Esq., Revising Officer for the electoral district of Kent, in the Province of Ontario, commanding him as such Revising Officer to hold an open Court for the final revision of the lists of voters for the said electoral district pursuant to the Electoral Franchise Act; and at such Court to hear and dispose of the objection or complaint of the said James K. Simmons, in his application to amend and correct the said list by striking off the name of William Dalton from the list of voters (as preliminarily revised) for polling district number one for the town of Chatham, &c.

It was arranged that the question of jurisdiction to make such an order, and whether the Revising Officer was in the position of a County Court Judge, should not be argued at present, but heard at a future time, if I should be of opinion, assuming there was jurisdiction, that the circumstances were such as to warrant the granting of a mandamus.

This turned upon two questions, viz.: Whether the notice to Dalton was sufficiently proved; and whether the

notice to the Revising Officer was properly served, and given in due time.

It appears that no copy of the notice to Dalton was kept, and no notice to produce was served. No authority was cited in support of this objection. I do not think it was necessary to give notice to produce, as Dalton knew the nature of the charge being made, and of the object of the application, and also that no notice to produce a notice is necessary. Mr. Errett swears that the notice was partly printed, like exhibit C., and partly written: it contained notice of application to strike Dalton's name off, to be made at the Town Hall, Chatham, 12th July, 1886, addressed to post office address given in the voter's list, and stating the ground of objection that he is not owner of the property mentioned in the said list as that on which he qualifies. It was mailed to him by registered letter at Chatham, postage prepaid. On cross-examination he says "exhibit D. is a certificate of registration of notice to Dalton. The notice to Dalton is in the form of exhibit C. stating name, residence. I know it was in this form, because I sent it. I know what was in the notice. Can't give the words of even the printed part of Dalton's notice word for word. Can't give the words of exhibit C., they were printed at the same time. I sent a paper like this to Dalton, name, qualification, post office address, residence, No. on roll, No. on concession, and objection. I have no independent recollection how the blanks in the printed notice to Dalton were filled up. The notices were all filled alike. I know how they were all filled up. It is from the practice as to the whole that I speak of Dalton's being filled up. * * I don't remember seeing this particular entry as to Dalton's on this exhibit A. (i. e. notice of objection). I don't know, as a matter of fact, that the notice, exhibit A., to the Revising Officer and the grounds of objection to Dalton stated in it were contained in the notice I mailed to him."

Mr. Christie says: "With regard to Dalton, I made out the objections to each person mentioned on schedule 1.

Notices were then prepared for Dalton and the other persons similar to exhibit C. When these forms, including Dalton's and others, (were filled up?) envelopes were addressed to Dalton and others, and the notices would be enclosed in the respective envelopes addressed to the parties notified; the letters or notices addressed to the parties were then compared as to the addresses with schedule 1 and these notices were, as to the town of Chatham entrusted to Mr. Errett. The notices to Dalton and others were prepared under my supervision." On cross-examination he says: "What I have said was done with my personal knowledge was so done. I think most of what was done was done with my knowledge. I don't pretend to have a personal recollection of the contents of the notice Errett says was sent to Dalton. I know that a notice was given to Errett for Dalton. I have a distinct recollection of the notices for polling division No. 1, but no distinct recollection of Dalton. I have a distinct recollection as to Dalton when I look at the document, but not otherwise. I don't remember the objection to Dalton except on looking at the notice. Apart from the document I have a distinct recollection of Dalton's name,—apart from that document and the voter's list, I have no specific recollection of the specific objections to Dalton's name. The envelopes were addressed by different persons in my presence. I checked over the list of names on the notices that were about to be mailed—they were in the envelopes, and I believe sealed, when I checked them over or compared them. I didn't compare the notices themselves with the list—I have no recollection of comparing Dalton's notice with the notice to the Revising Officer, as distinguished from polling division 1."

The certificate of registration with Errett's and Christie's evidence is amply sufficient to establish that a letter was mailed to Dalton on Saturday, the 26th June, being two full weeks before Monday, the 12th July. And it seems to me that the evidence of Errett and Christie also prove that the envelope contained a notice similar to Exhibit C., as to

the printed part, and was filled up with name, address, &c., and objection. Neither of these witnesses can speak from recollection, independent of the papers shewn to them, of the very words of the notice; but they were preparing notices of objection to several persons on the voter's list, and upon seeing the list, and the objection in the notice to the Revising Officer, they have a distinct recollection of the contents of the notice. This was certainly such evidence as might be submitted to a jury, and if not contradicted would justify a finding that the proper notice was sent to Dalton. There is no evidence to the contrary.

The notice to the Revising Officer was left in the office of the Revising Officer with his clerk, on Monday, the 28th June. This notice and contents are proved. The objection is to leaving it with the clerk, and to its being too late.

The time appointed for the holding the final revision was Monday, the 12th July, and it is conceded by all parties that the last day for service of the notice was Sunday, the 27th of June. The 26th sec. of "The Franchise Act," 48 and 49 Vic. ch. 40 (D.), requires the notice to be given "not less than two weeks before the day named for the final revision." But by section 2, sub-sec. 2 of the Act, if the time limited for doing any act, &c., expires upon a Sunday or holiday, the time so limited shall be extended to, and such act may be done upon the day next following, which is not a Sunday, &c. This overrides the whole Act, and the last day for giving notice expiring on Sunday, the notice was well given upon Monday. The Revising Officer relied upon some statements in Mr. Hodgins' book, that the notice might be served on Sunday. But Mr. Hodgins also says, p. 52: "Where the last day for doing an act which is to be done by the Court falls on a Sunday or a holiday, it may be done on the next practicable day thereafter."

Mr. Ermatinger in his work on the Act, makes a more precise statement, and one that entirely agrees with my views of the Act. In his note to sec. 27, p. 57, on the phrase "not less than two weeks before," he refers to his

note to sec. 19, where remarking on the phrase "at least one week before," he says, "but if the last day for giving the notice falls on Sunday or a holiday, then under sec. 2, sub-sec. 2, the notice may be given on the following day."

I think the notice was in time.

The statute, sections 19 & 26, requires the notice to be deposited with or mailed to the Revising Officer. In the present case it was served upon Mr. Hughes, the clerk of the Revising Officer, and filed by him at the office of the Revising Officer, on the 28th June, at 2.25 p.m. I think this is a sufficient *depositing with* the Revising Officer to satisfy the statute. But there is further evidence that shows how unjust it would be to allow such an objection to prevail. Mr. Christie says, that in the afternoon of the 28th June, about five o'clock, he met the Revising Officer and told him that the notices to him for the town of Chatham had been left with the Revising Officer's clerk, and he asked the Revising Officer whether he would require them to be given to him personally, and if he did so he (Christie) would obtain the notices and deliver them to the Revising Officer personally. The Revising Officer informed Christie that it was sufficient to leave the notices with his clerk. This, I think, amounts to an adoption of the action of the clerk, and is equivalent to a personal service, if such be required by the statute. There is a marked difference in section 19, between service on the Revising Officer and that on the person objected to. The notice is to be deposited with or mailed to the Revising Officer, but the notice to the person objected to is to be served by delivering such notice to such person, or by mailing, &c., thus warranting the inference that *deposit with* does not mean delivery to the person.

I think the notice was well served.

It appeared from the affidavits that Dalton had sold his property before the 20th of June, and admitted in July that he had no interest in the land for which he was registered on the list of voters.

If it be found that there is jurisdiction in this Court to make the order asked for, I think the circumstances of the case justify the granting of it; the Revising Officer having refused to hear the objection.

The above judgment having been delivered, the argument on the question of jurisdiction took place on September 20th, 1886, before Proudfoot J.

Aylesworth, for the motion. A Judge in Court constitutes a sitting of the High Court and this application is made to the High Court. At the time of the Ontario Judicature Act the Court of Queen's Bench had the powers of the Court of King's Bench in England. The King's Bench in England was a Court of Record, possessing inherent jurisdiction independent of any statute, and had power to issue the prerogative writ of mandamus to any inferior Court or official. The official here is the same as officials under the Provincial Statute to revise voter's lists. There is no distinction between Dominion and Provincial in that respect. The cases shew that the Court of Queen's Bench used to mandamus County Court Judges to hear appeals from Courts of Revision. The test is,—Are they inferior Courts, or Courts of co-ordinate jurisdiction? No matter how the Revising Officers are appointed, they are subject to the Courts of the country, and they are not Courts of co-ordinate jurisdiction. A Court being a Court of Record, makes no difference. County Courts are Courts of Record, but writs of mandamus have been directed to them. The Court of Queen's Bench has general jurisdiction over all inferior Courts: *Tapping* on Mandamus, 154. In the case of *Ex. p. Smyth*, 4 N. & M. 582; 3 A. & El. 719; 1 H. & W. 417, it was never questioned either in the argument or judgment, but that the writ would lie from the King's Bench to the Judicial Committee of the Privy Council in a proper case if they refused to do their duty. Among other inferior Courts, those of Revising Barristers are mentioned in *Tapping*, 57, 58 and 107. Inferior

Courts are all Courts of special jurisdiction: *Wharton's Law Lex.* A Revising Officer is one. County Court Judges derive their authority from the Dominion, and a mandamus can be issued to them.

Osler, Q. C. Section 41, B. N. A. Act shows that the Parliament of Canada reserved to itself the power to do certain things. See also section 101. The Franchise Act was passed under the authority of these two sections. Section 14 of the Franchise Act provides who may be a Revising Officer, and section 28 invests him with all the powers of a Court of Record, and section 43 gives him powers of amendment and to adjourn sittings, &c., "so as *in his judgment* to do justice to all parties." Section 49 provides for an appeal in case the Revising Officer is not a County Judge, and section 53 points out the appellate Courts. [PROUDFOOT, J.—Is there any appeal under the statute from the Revising Officer in this case?] No. [PROUDFOOT, J.—Then perhaps the question is—Has he acted?] In *Valin v. Langlois*, 3 S. C. R. 1, 5 App. Cas. 115, the Dominion Parliament had given the power to the Provincial Courts, and so made them Dominion Courts *ad hoc*, and so conferred jurisdiction to control Dominion officials. Without special legislation the writ of mandamus cannot go from the Provincial Courts. In *High on Extraordinary Legal Remedies*, section 573, a reference is made as to cases in the Federal Courts and State Courts. There, it is said, the officers deriving their powers from the State are beyond the jurisdiction of the Federal Courts and the State has the sovereign power the same as the Dominion has here. There is no right of appeal given, and the Courts of the Province cannot review. I refer to *The Queen v. The Judges and Justices of the Central Criminal Court*, 11 Q. B. D. 479. *Ex p. Fernandez*, 10 C. B. N. S. 3. In *re Burns & Butterfield*, 12 U. C. R. 140. In *re Woods v. Rennett*, 12 U. C. R. 167, Robinson C.J., said, at p. 168, "We can command the Judge of an inferior Court to give judgment in a matter proper for his cognizance, but we cannot in this manner review his proceedings." When a Judge

* * has entered on the hearing * * has decided that he had no jurisdiction to adjudicate * * a mandamus will not be * * even although he may be wrong in point of law: *Ex p. Milner, Milner v. Rhoden*, 15 Jur. 1037. Here the Court has heard the evidence and given judgment, and it cannot be interfered with, otherwise a mandamus would be an appeal in every case.

Aylesworth, in reply. The Revising Officer does not constitute a Court of Record. What constitutes a Court of Record is shewn in *Herman* on Estoppel and Res. Judicata, 398. Section 14 of the Statute does not make him a Court of Record. By section 28 he has certain powers of a Court of Record, a very different provision from that in the "Dominion Controverted Elections Act of 1874," 37 Vic. c. 10. sec. 48, where a Court of Record is constituted by the words "*shall be*" a Court of Record. See also R. S. O. c. 47, sec. 7, where the judgments of the Division Courts have the same force and effect as Courts of Record, but the Division Courts are not made Courts of Record. Provincial Courts have jurisdiction over Customs officials who are appointed by the Dominion Government. The Insolvency Courts were Dominion Courts, and no one would question the right of a Provincial Court to mandamus them to perform their functions. An official appointed by the Dominion Government is not thereby placed beyond the reach of the Provincial Courts. A Dominion Court Judge's decision is final, except in certain cases, and yet a mandamus may be directed to them. No Court in the United States has inherent jurisdiction, they are all the creatures of statute: *Herman* 399. There is no analogy in the United States decisions. There has been no decision by the Revising Officer on the merits in this case. See also *Willis v. MacLachlan*, 1 Ex. D. 376.

September 29, 1886. PROUDFOOT, J.—Having determined that the facts of this case justified the granting of a mandamus, if I had jurisdiction to grant it, this question of jurisdiction has recently been argued.

There is no question that each Division of the High Court of Justice has all the jurisdiction vested in any of the other Courts when the Judicature Act passed. The Queen's Bench had the power to issue a mandamus to any inferior Court or tribunal, and that power has in several instances been exercised by this Division. The Revising Officer here is the Junior Judge of the County of Kent.

There are frequent instances of writs of mandamus to County Court Judges to hear appeals from the Court of Revision. And it does not offer any objection to a writ of mandamus that it is granted against an inferior Court, although a Court of Record. In this case as the Revising Officer is a Judge of the County Court there is no appeal from his decision.

But the question is different where the Revising Officer declines to perform a duty cast upon him by the Act. In such case is there no remedy? It is said that being appointed by the Dominion Government, the local Courts have no power over him. I think the Supreme Court of the Dominion has no jurisdiction to interfere with him. It has no original jurisdiction except in exchequer cases. There is therefore no Dominion Court to which to apply in case of a refusal of a Revising Officer to discharge his duty.

I assume that the Electoral Franchise Act of 1885, was properly enacted under the authority of the British North America Act, 1867. The 14th section declares who may be appointed a Revising Officer, and the 28th section clothes him with all the powers of any Court of record in the Province, as to compelling the attendance and examination of witnesses, &c., and shall have generally all the powers of a Court of Record, for the purposes of the preliminary and final revision of the lists of voters.

I do not think that this provision constitutes the Revising Officer a Court of Record. It gives him the power of such a Court for certain specific purposes. He is simply an officer with a special and limited jurisdiction. And as a general rule a mandamus would be granted to such an officer.

In *Valin v. Langlois*, 3 S. C. R. 1, it was held that until the Dominion Legislature interfered, the power of dealing with controverted elections fell within the jurisdiction of the Superior Courts of the Provinces, by virtue of the inherent original jurisdictions of such Courts over civil rights. That the Dominion Parliament has the right to interfere with civil rights when necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of Canada. That the exclusive power of legislation given to Provincial Legislatures over procedure in civil matters, means procedure in civil matters within the powers of the Provincial Legislatures.

The Dominion Parliament has, by the Electoral Franchise Act, interfered with civil rights in the Province, but in doing so it has made no provision for a Court which can superintend the conduct of the officers appointed under that Act. It seems, therefore, a fair deduction from *Valin v. Langlois*, that, until the creation of such a tribunal, the Provincial Courts, by virtue of their inherent jurisdiction, have a right to superintend the discharge of their duties by any inferior officer or tribunal.

In *Re McCulloch et al.*, 35 U. C. R. 449, is an instance of the exercise by the Court of Queen's Bench of the power to require the Judge of a County Court, under an Ontario Act, to perform his duty on an appeal from the Court of Revision, which he had refused to hear on the ground of some technical objection. Had the Judge heard the case his decision would have been, as in this case, final : 32 Vic. ch. 36, sec. 67. (O.)

Blackstone, (Comment 3, 110, 15th ed. by *Christian*), after specifying a number of matters in which a writ of mandamus is the proper remedy, proceeds to say : " But at present we are more particularly to remark, that it issues to the Judges of any inferior Court, commanding them to do justice according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the Court of King's Bench to superintend all inferior tribunals,

and therein to enforce the due exercise of those judicial or ministerial powers, with which the Crown or Legislature have invested them."

The Dominion Parliament may, on this subject of franchise, interfere with civil rights in this Province ; but where they have not provided any means by which the due exercise of their functions could be secured, it must be inferred that they meant this duty to be performed by the Courts which were the guardians of these civil rights, and which are so still to the extent they have not been transferred to any other tribunal.

It was then argued that the Revising Officer had decided the question, and that there was no appeal from his decision. The Revising Officer erred in point of law, in assuming that the notice to him required personal service and that it was too late. He also erred in point of law in holding that notice to produce the notice mailed to Dalton should have been given. I think that is the meaning of the third of six findings. He finds, First, That there was no evidence that there was a notice served on Dalton or mailed to him as required by sections 19 & 20. Second, No proper notice was left or deposited with the revising officer, or mailed to him by registered letter as required by the Act. Third, That the notice should have been proved by a copy, and that the evidence given was inadmissible.

Now, though this reference to notice in the third finding follows the second, which refers to a notice to the Revising Officer, it could not refer to the notice to the Revising Officer, because the notice to him was in evidence before him, and would have been absurd to say that the original notice then before him should have been proved by a copy. The notice spoken of in the third finding must therefore refer to that to Dalton, the evidence of which he held was inadmissible, and he must have held it to be inadmissible on the ground of the objection, that no notice to produce was given, an objection which appears to have been taken before him, for when evidence of its contents was being given, it was objected to and taken subject to objection. And the same objection was made before me.

If the Revising Officer had found, as a matter of fact, that notice was not given to Dalton, there might have been some difficulty to interfere with his conclusion ; but where he came to that finding on the ground that notice to produce should have been given, it is not a finding of fact but an error in law. And such mistakes or errors are not such decisions as prevent the granting of the writ.

In *Regina v. Leicester*, 15 B. R. 671, the inferior tribunal made a mistake in supposing that personal service of a notice was required, and a mandamus was granted : in the same case, as to another person, it was sworn that personal service had been effected, but the Court discredited the witness and found that it had not been served, and the mandamus was refused.

I observe that the Revising Officer cites the remark of Richards, C. J., in *Re McCulloch*, that the inclination of the Courts is in every way to favor the franchise ; and Acts of Parliament should be worked out to confer the franchise on those who seem to be within the spirit of the law entitled to it, rather than be strained to deprive the parties of a right to vote. I need scarcely say that I entirely agree in that opinion, where, as in that case, there is evidence clearly showing the right of the applicant to vote. But that is just what is wanting in the present. Dalton has made no affidavit showing him to be entitled to vote, while there is evidence to the contrary.

As it appears that this is to be a test case, I presume that it will be of little avail my saying that I am persuaded the Revising Officer has erred in judgment only, and that he had no other intention in the course he pursued than fairly to act in the performance of his duty ; and to express a hope that he may yet call another meeting and admit the objection and dispose of it upon the merits.

I had written so far when I was referred to the *Centre Wellington Case*, 44 U. C. R., 132, which was not cited by the counsel on either side. A mandamus was there applied for to the junior Judge of the County of Wellington, to proceed with the recount of votes under 41 Vic., ch.

6, sec. 14, (D.) and was refused as being a matter not within its jurisdiction but belonging to Parliament alone.

An election had been held. It was admitted by the counsel for the applicant that the object might have been attained by filing an election petition. The Court proceeds perhaps upon no wider grounds. The learned Chief Justice, who gave the judgment of the Court, saying at p. 141: "Nothing that I have heard on the argument of this rule has removed from my mind the leading difficulty of the proposition sought to be established, viz: that the Court is asked to interpose its authority in the direction of proceedings which appear to belong altogether to another jurisdiction, which has always asserted with success its right to regulate the conduct and execution of writs for the election of members. * * When a petition is presented for an undue return, or complaining of no return, it has to be decided by the Judges; and in the course of such enquiry the regularity of proceedings, and the conduct of officials entrusted with the execution of writs of election, may come in question, just as such matters might have been questioned before the election committee under the old system. But I fail altogether to see what power has been given to a Court of Law to interpose by mandamus or prohibition, so as to affect to regulate the proceedings of such officials in the execution of their duties under the election law. * *

And at p. 142: "The main objection seems to be this, that the person against whom the writ is asked is, as it were, the officer of another jurisdiction, which can exercise control over him, if necessary, and to whom, and not to us, he is amenable. I assume, * * that the House of Commons has the power of enforcing returns to the writs issued for the election of those members. They have the right to enquire why any one or more constituencies may be unrepresented." But the learned Chief Justice further says, at p. 143: "The famous discussion in *Ashby v. White*, seems to range over the whole field of the law of Parliament. The distinction seems very clear between an individual

seeking to vindicate in the Courts his right to exercise his franchise and that of an interference by the Courts in the conduct of officers in the execution of the writ of election, or the return thereof."

This case is then in its terms confined to the conduct of officers in the execution of the writ of election. And the applicant could have got the benefit of the objection by filing an election petition,—and the Court draw a clear distinction between such an interference, and an individual seeking to vindicate his right to exercise his franchise.

Since that decision the law has been very much changed. *Then*, upon a scrutiny, the right of voters who appeared upon the rolls might be investigated. *Now*, by the Electoral Franchise Act, 1885, sec. 31, after the final revision the lists shall be binding on any Judge or other tribunal appointed for the trial of any petition complaining of an undue election or return of a member to serve in the House of Commons. This language is as strong as that in the Voter's List Finality Act of 1878, of Ontario, 41 Vic. ch. 21, and which, in the *South Wentworth Case*, H. E. C. 531, precluded any inquiry into the legality of the votes on the lists, except those specially excepted. There is no appeal from the Revising Officer in this case. There is no other possible mode of vindicating the right to the franchise, or getting rid of illegal votes, but by this proceeding. This is rendered more clear by the Electoral Franchise Act Amendment, 1886, 49 Vic., ch. 3, (D) which requires the voter to swear that he is the person named in the list but not as to his qualification to vote. No application could be, in my opinion, successfully made to the House of Commons to correct the act of the Revising Officer in refusing to hear the objection. It is just the case in which it is said mandamus is the proper remedy, there being no other: *Rex v. Windham*, 1 Cowp. 377.

I grant a mandamus. Costs against Dalton.

G. A. B.

[CHANCERY DIVISION.]

BLACK V. BESSE.

*Evidence—Exclusion of witnesses at trial—Witness remaining in Court—
Rejection of his evidence—New trial.*

At the trial of an action the witnesses were ordered out of Court. Before the case was closed the defendant's counsel tendered a witness who had remained in Court, but the presiding Judge refused to allow him to be examined. On a motion for a new trial it was

Held, that there must be a new trial.

Per PROUDFOOT, J.—The practice is to receive such evidence, but with great care.

THIS was an action brought by William S. Black against John H. Besse on a promissory note.

The action was tried at the Whitby Spring Assizes before Cameron, C. J. C. P. D., with a jury, on April 21st, 1886.

McGillivray, for the plaintiff.

J. W. McCullough, for the defendant.

At the trial the witnesses were ordered out of Court, and at the close of the case defendant's counsel tendered the evidence of a witness who had remained in Court, and the learned Judge refused to allow such witness to be examined.

The jury brought in a verdict for the plaintiff.

Against this verdict the defendant moved and asked for a new trial on the grounds: 1. That the evidence of the witness who had remained in Court had been improperly rejected by the learned Judge; 2. That there was evidence that the note had been altered after it was signed; and 3. The subsequent discovery of evidence (a).

S. H. Blake, Q.C., and *J. W. McCullough*, for the motion. The learned Judge was wrong in refusing to allow the wit-

(a) The last two points were also argued, but as the judgment of the Court proceeded entirely on the first it is unnecessary to notice them further.

ness in Court to be examined. His examination would have negatived the alleged admissions of defendant that he made the note. The Court should not punish a suitor for the conduct of a witness even if he be contumacious, which was not the case here: R. S. O. ch. 50, sec. 260; *Taylor on Evidence*, vol. 2, 8th ed., 1193.

Chapple. The witnesses were put out of Court on the application of the defendant. The defendant did not intend to call any. He should not be allowed to change his tactics so as to call anyone who had remained in Court; and it would be unfair to allow such a proceeding after the plaintiff's witnesses had been heard giving their testimony. It might have been planned by defendant's counsel, although I do not say it was in this case.

Blake, Q.C., in reply. There was no plan of defendant's counsel, and even if he made such a mistake the client's rights should not be taken away from him.

September 6, 1886. *BOYD, C.*—I am inclined to think there must be new trial. It does not appear that there was any scheme on the part of defendant in keeping the witness in Court. On that point there should be a new trial; costs of this application and of the first trial to be disposed of by the Judge at the next trial.

PROUDFOOT, J.—I concur in the judgment of the Chancellor, as I think the practice is, that the evidence of such a witness should be received, but with great care.

G. A. B.

[QUEEN'S BENCH DIVISION.]

REGINA V. ELLIOTT.

Canada Temperance Act, 1878—Conviction—Want of jurisdiction on face—Amendment of return—Excess of jurisdiction.

The fact that the Canada Temperance Act, 1878, (second part) is in force in any county, &c., must be proved like any other fact necessary to give jurisdiction.

Where, however, a conviction did not on its face shew that the Act was in force, the Court on the merits allowed the return to be amended so as to shew jurisdiction, and for this purpose allowed a further return of the "Gazette" produced as an exhibit, but not filed.

The Magistrate ordered the defendant to pay \$1 for the use of the hall for trying the case, and condemned the defendant, in default of distress, to imprisonment.

Held, that in ordering payment of this sum there was a clear excess of jurisdiction, and that ordering distress, &c., was a further excess, and that the matter was one of principle and not of form, and the conviction was quashed.

Regina v. Wallace, 4 O. R. 127, and *Regina v. Walsh*, 2 O. R. 206, commented on.

Marsh, for the motion.

W. Nesbitt, contra.

The facts, objections taken, and arguments of counsel appear in the judgment.

March 20, 1886. ROSE, J.—This was a motion to make absolute an order *nisi* granted on return of a *certiorari* to quash a conviction under the Canada Temperance Act, 1878, for selling intoxicating liquor in the county of Stormont, contrary to the provisions of the Act.

The grounds taken and pressed before me by Mr. Marsh, were :

1. That there was no evidence that the Act had been brought into operation in that county.

2. That the conviction does not on its face shew that the Act was in force, and hence does not shew jurisdiction in the magistrates.

3. That the magistrates had no jurisdiction to order the defendant to pay \$1 for the "use of the hall for hearing the case."

4. Nor eighty cents for eight several subpoenas, schedule "B." ch. 77 R. S. O., authorizing the charge for one subpoena only.

5. That the conviction was bad, in that the defendant was condemned to imprisonment for the non-payment of these sums thus illegally ordered to be paid.

Mr. Nesbitt objected that the writ of *certiorari* had been taken away by sec. 111 of the Canada Temperance Act, 41 Vict. ch. 16, and in answer to Mr. Marsh contended (1) that the conviction stating that the sale was "in contravention of the Canada Temperance Act, 1878," showed jurisdiction, as the meaning must be that the Act was in force; (2) that the conviction was not invalid by reason of excessive costs being ordered, the remedy being by action against the magistrate under the statute, cap. 77 R. S. O. 3. That the magistrate had a reasonable discretion as to the direction to pay the \$1, nothing being said in the Act as to the same. 4. That the amount charged for subpoenas was for copies, or at least it might be so argued, as it was within what the statute, Schedule B, allowed, 10 cents per folio being allowed for copies. 5. That sec. 118 shews that the appeal must be considered on the merits.

The consideration of the questions as to whether the writ has been improvidently issued, and whether the jurisdiction of the magistrate has been made to appear may be considered together and involves an interesting analysis of secs. 99, 109, 110, 111, 117, and 118, of the Canada Temperance Act.

Section 111 provides that "no conviction, judgment or order *in any such case* shall be removed by *certiorari*, or otherwise, into any of Her Majesty's Superior Courts of Record," &c.

Section 110 provides that "any person who either before or after the summons of any witness *in any such case*, tampers with such witness * * shall be liable to a penalty," &c.

We are thus apparently referred back to sec. 109: "when any person is convicted of any offence against the provisions of the second part of this Act," &c.

I would therefore read sec. 111 as taking away the writ in any case of conviction of any offence against the provisions of the second part of the Act. This was the opinion of the majority of the Court in *Regina v. Wallace*, 4 O. R. 127, and in *Ex parte Hacket*, 21 New Brunswick S. C. R. 513.

But there must be shewn to have been an offence, for if the conviction is nominally under the Act, but for a supposed offence which does not appear to be an offence, then it would not be a conviction "in any such case," *i.e.*, "of an offence against the provisions of the second part of this Act," and hence sec. 111 would not apply.

By reference to sec. 99 we find that there can be no "offence against the provisions of the second part of this Act" in any county or city until it "comes into force and takes effect" in such county or city, and then only for so long as it continues in force; and by sec. 96 provision is made for bringing the Act into force by an order in council, which may by sec. 97 be revoked after three years on petition, &c.

The fact of its coming into force must be proved as any other fact necessary to give jurisdiction: *Regina v. Bennett*, 1 O. R. 445; *Regina v. Walsh*, 2 O. R. 206, and see particularly p. 216.

If the second part of the Act is not brought into force in any named county, it follows that no magistrate in such county has jurisdiction to entertain any complaint lodged under the provisions of that part, and that therefore there would be no offence against the provisions of that part triable by him. It further follows that the right to the writ of *certiorari* is not by sec. 111 taken away from any person convicted of an alleged offence against such provisions if no such offence could have existed, and that therefore the writ is not taken away in all cases arising under the Canada Temperance Act. See *Regina v. Ryan*, 10 O. R. 254, and authorities therein referred to; also *Ex parte Bradlaugh*, 3 Q. B. D. 509, cited in *Regina v. Walsh*, at p. 215.

It further follows from the above that if no evidence is given of the Act being in force the proceedings will be quite as defective as if in fact it were not in force.

Then what is the effect of the conviction not shewing on its face that the Act is in force ?

Section 117 provides that "No conviction * * shall be held insufficient or invalid by reason of any variance between the information or conviction, or by reason of any other defect in form or substance, provided it can be understood *from such conviction* * * that the same was made for an *offence against some provision of such Act within the jurisdiction of the justice or magistrate*, or other officer who made or signed the same, *and provided* there is evidence to prove such offence, *and* no greater penalty is imposed than is authorized by such Act."

It thus appears that unless jurisdiction appear on the face of the conviction and there is evidence to prove the offence, and the penalty is authorized by the Act, section 117 does not protect the conviction against defects of form or substance.

It would therefore seem that if application be made for a writ of *certiorari*, and it appears that no jurisdiction is shewn in the magistrate either to entertain the complaint or make the order, the writ should be granted.

This would appear if the offence charged (1) was not "against some provision of such Act;" (2) was not "an offence against some provisions of such Act within the jurisdiction of the justices or magistrates" (and by jurisdiction I would think is meant jurisdiction by reason of an offence shewn, or territorial jurisdiction). (3) If there was no evidence to prove such offence; or (4) if there was no jurisdiction to make the order by reason of the penalty being greater than as authorized by the Act.

This construction it seems to me in exact accord with the result arrived at by Hagarty, C. J., in *Regina v. Wallace*, 4 O. R. at p. 138, where he says: "It is clear, however, that although so taken away the Court has the right to see that the jurisdiction given to the magistrate has not been exceeded."

I am aware the preceding clause of the judgment of that most learned Judge contains the statement that "the *certiorari* is, I hold, to be taken away by this Act." It seems to me, however, that clause must be read with the context, as not intended to state more than the Act in terms states, because the point under consideration was not whether the Act in terms takes away the writ when no offence was shewn, but merely whether there was power in the Court to review the evidence to see if the conviction was wrong on the merits. I refer to his observations on p. 140, and particularly to the following: "We have to see that the inferior tribunal acted strictly within the authority of the Act, duly heard the case, and gave its decision upon the evidence duly laid before him."

I observe that the learned Chief Justice, in quoting sec. 117, did not feel called upon to attach special weight to the word "from such conviction, warrant, process, or proceeding," after "it can be understood," and has omitted them from the quotation. It will be observed that for my argument I have been compelled to rely upon them for much support.

The opinion of Mr. Justice Armour in the same case is confined to deciding that the writ could not providently be granted to review an erroneous finding on the evidence: see p. 133. The citations from *Ex parte Hopwood* are not, I think, applicable to the peculiar language of sec. 117.

The construction I have thus endeavored to place upon sec. 117 seems further to be in accord with the opinion of Mellor, J., in *Ex parte Bradlaugh*, as quoted by Cameron, J., in *Regina v. Walsh*, at p. 215: "It is well established that the provision taking away the *certiorari* does not apply where there was an absence of jurisdiction. The consequence of holding otherwise would be that a metropolitan magistrate could make any order he pleased without question."

When we look at the provisions of sec. 118, it would appear that the above view is not ill founded, for express

provision is made for proceedings "upon any application to quash such conviction * * by way of *certiorari* * *." The Court is directed to "dispose of such * * application *upon the merits*, "notwithstanding any such variance or defect as aforesaid;" that is, as I understand it, if, by reason of "any such variance or defect," the writ be providently granted, the conviction shall not be quashed, if on the merits, *i. e.*, merits shewn upon the evidence, sufficient appears to enable the variance or defect to be relieved against by amendment; and hence follow the words, "and such Court or Judge may in any case amend the same if necessary."

By evidence I further understand to be included evidence of the witnesses as to the facts proven, or evidence of the action of the magistrates, as shewn by their notes and memoranda, of formal steps taken, adjudication, &c.; in other words, if it can be understood from the conviction, &c., that there was an offence committed against the provisions of the second part of the Act, brought into force for the county in question; evidence to prove such offence and no greater penalty imposed than authorized by the Act; then no conviction, &c., is to be held invalid by reason of any variance or defect in form or substance, and all necessary amendments must be made to relieve against the defect.

It would also seem that if such defects exist as entitle the defendant to the writ, then unless upon the merits the amendment should be made it ought not to be made; and further, that if "there is evidence to prove such offence," *i. e.*, any evidence, and "it appears that the merits have been tried," there is to be no review, or appeal, or re-trial; but if the conviction is sufficient, whether with or without amendment as above provided, then it shall not be granted.

To apply the foregoing to the facts of this case. I cannot understand from the conviction that it was made for an offence against any provision of the Act within the jurisdiction of the justices who made it, for nothing appears by way of recital or statement that it was brought into

force for the county of Stormont, or was in force at the time of the conviction.

I find, looking at the evidence, that the Act was brought into force. As I must decide upon the merits I cannot yield to the objection that the "Gazette," which was produced and marked as an exhibit, is not among the papers returned, for I ought to allow such omission to be now remedied by requiring a more complete return, and therefore treat the evidence as if it had been returned. I should therefore amend the conviction under sec. 118, to remedy that defect as to the non-statement of jurisdiction, and as against such objection refuse to quash. But as the defect appeared upon the face of the conviction and it was necessary to invoke the powers conferred upon the Court by sec. 118, I think the writ providently issued and that the evidence &c., are properly before me.

I am directed to dispose of the application on the merits, and I therefore consider what merit there is in the objections that the magistrates ordered the defendant to pay for the use of the hall when used for the hearing. This item is found in the minute of judgment, among the items forming the costs ordered to be paid, and for which distress, and in default of distress, imprisonment. No authority was cited for such a charge and I know of none.

Ch. 77, R. S. O., provides a table or tariff of costs, which the justices are authorized to direct payment of, and payment of no other costs can be ordered.

If the power exist to charge and collect the dollar, then any other sum, no matter how large, that in the discretion of the magistrates was paid for a commodious hall to accommodate a large number of the public who might be interested in a particular case, could also be ordered to be paid.

If this could be upheld we might next have the magistrates assessing the rent of their offices upon the unfortunate delinquents who were brought before them.

In ordering payment of this sum there was, I think, a clear excess of authority or jurisdiction, and in ordering

collection by distress and in default imprisonment the magistrates made a further order which they had no power to make and in excess of jurisdiction.

I have no power to amend this, because if I altered the conviction by reducing the amount of costs by \$1 I would be creating a variance between the adjudication and the conviction, and thus bring the case within *Regina v. Walsh*, see p. 211, and I have no power to interfere with the adjudication.

The conviction cannot stand, and must be quashed. The proceeding is not one of form but of substance, and involves a principle.

It thus becomes unnecessary to consider the question as to the subpœnas. If the charge is for originals, it is contrary to the provisions of schedule B.; if it is for copies, the language used is inapt.

So far as the evidence discloses, the defendant was guilty of selling intoxicating liquor contrary to the provisions of the Act, and therefore he is not entitled to any costs, even if on other grounds I could properly give them to him.

The conviction will be quashed, without costs.

Conviction quashed, without costs.

[CHANCERY DIVISION.]

BOULTON ET AL. V. BLAKE.

Lease—Covenant to pay rent and taxes—Conveyance away of part of the leased premises—Assignment by lessee—Action for part of the rent and taxes—Apportionment—Eviction—Local improvement taxes—Additions to taxes in arrear.

J. B. leased certain lots A. B. C. D. E. & F. with *other* lands to the defendant. J. C. also at the same time leased lot G. and *other* lands to defendant. J. C. then conveyed his reversion in lot G. to J. B., and J. B. conveyed away the *other* lands mentioned in his lease to S. A. H. Defendant assigned all his interest in both leases to J. S. McM., with the knowledge that J. S. McM. intended to endeavour to procure a conveyance of the fee for the purpose of laying out the land in building lots, which he failed to do, and J. S. McM. assigned all his interest in lots to A. B. C. D. E. F. and G. to C. Both J. S. McM. and J. C. paid rent to J. B., and after his death to his executrix the plaintiff. The rent of lots of A. B. C. D. E. F. and G. fell in arrear, and the taxes also were left unpaid. Plaintiff then recovered judgment in an action of ejectment against C., and took possession of the lots.

In an action to recover the unpaid rent and taxes accrued on these lots before the recovery in ejectment, in which it was contended that as the action was brought against the original lessee who had assigned the lease, and was one on the covenant resting in privity of contract and not in privity of estate, there could not be an apportionment of the rent as to these lots. It was

Held, following *The Mayor, &c., of Swansea v. Thomas*, 10 Q. B. D. 48, that the rent was apportionable, and the plaintiff was entitled to recover.

Held, also, that there was no eviction of the defendant by the lessor.

Held, also, on the evidence that although defendant might be a surety for the assignee, there was no release of the assignee, and consequently no discharge of the surety.

Held, also, following *Barnes v. Bellamy*, 44 U. C. R. 303, that the rent accrued from day to day, and was apportionable in respect of time accordingly.

Held, lastly, that under the wording of the covenant to pay "all taxes, rates, duties, and assessments whatsoever. * * now charged or hereafter to be charged upon the said demised premises," the defendant was liable for local improvement taxes and for the additions made under the Assessment Act year by year to the amount of the taxes in arrear or additions made by the municipality.

THIS was an action brought by Martha Rowan Boulton, as executrix and devisee of John Boulton, against Richard Benjamin Blake, to recover rent and unpaid taxes due under two certain leases, one made by said John Boulton in his lifetime to the defendant, and the other made by John Cayley and others to the defendant.

The facts are fully set out in the judgment.

The action was tried at the Toronto Sittings on the 18th and 19th days of May, A. D. 1886, before Ferguson, J.

Moss, Q. C., for the plaintiff. The plaintiff is entitled to recover the unpaid rent and taxes under the covenant.

Osler, Q. C., and *Small*, called upon by the Court. The plaintiff is not entitled in any event to seven quarters' rent, as the seventh quarter had not expired when the plaintiff took possession under the ejectment proceedings. On the return of the collector's roll with the taxes unpaid the breach, if any, was complete, and the defendant is not liable for the additions made by the municipality as damages; he can only be charged with legal interest. There was no breach before the term was assigned to McMurray. Boulton in his lifetime accepted rent from the assignee. The reversion also was divided by a deed to Mrs. Heath. As soon as eviction occurred the right of action on the covenant was gone. Blake having assigned all his interest is not liable for what his assignee did. The result of the sale from Boulton's vendee, Mrs. Heath, to Blake's assignee, McMurray, was that the lease was at an end as to part of the property, and so the whole covenant was destroyed. Henry street was opened through the property with the consent and on a petition signed by Boulton. It is true Blake signed it too, but that was as a ratepayer on other property. That street destroyed the land for the purpose and in the form it was accepted as, viz., "The Cricket Ground." Blake in any event would not be liable for the local improvements on this street. There can be no apportionment of the rent under the circumstances here. After Boulton had accepted the lessee's assignee as tenant the lessee was only a surety. By the act of the lessor and assignee the sureties' security is done away with and he is released. His principal security was the right of renewal of the lease, and this was done away with by turning part of the property into freehold. On apportionment on value, not on quantity, we refer to *Smith v. Malings*, Cro. Jac. 160; *Ewer v. Moyle*, Cro. Eliz. 771. The whole rent is

suspended if there is an eviction from even part of the property: *Carey v. Bostwick*, 10 U. C. R. 156, and the defendant was no party to the eviction. As to what amounts to an eviction see *Upton v. Townsend—Upton v. Greenlees*, 17 C. B. 30. Any alteration of a grave and permanent character is an eviction. As soon as Henry street was established in any way there was an eviction. If the tenant loses the benefit of the enjoyment of the demised premises by the act of the landlord the rent is thereby suspended: *Nixon v. Maltby*, 7 A. R., per Burton, J. A., at p. 286. We refer also to *Smith v. Raleigh*, 3 Camp. 513; *Morrison v. Chadwick*, 7 C. B. 283; *Coleman v. Reddick*, 25 C. P. 579; *Shuttleworth v. Shaw*, 6 U. C. R. 539; *Stevenson v. Lambard*, 2 East. 575; *Hodgkins v. Robson*, 1 Ventris. 276; *Macdonald v. Vanwyck*, 12 C. P. 263; *Oliver v. Mowat*, 34 U. C. R. 472; *Baylies on Sureties and Guarantors*, 490; *Moule v. Garrett*, L. R. 5 Ex. 132; *Humble v. Langston*, 7 M. & W. 517; *Lewin's Law of Apportionment*, 12; *Holgate v. Kay*, 1 C. & K. 341; *Archbold's L. & T.*, 3rd ed. 182; *Woodfall's L. & T.*, 10th ed., 362, 368, 371; *Salmon v. Smith*, 1 Wms. Saunds. 206, note 2, p. 208, 212; *Reeve v. Bird*, 1 C. M. & R. 41; *Smith v. Mapleback*, 1 T. R. 441; *Nickells v. Atherstone*, 10 Q. B. 944.

Moss, Q. C., in reply. The defendant covenanted to pay rent and taxes, and has not done so. Neither Boulton nor his representatives have done any act with the intention of giving up any part of their claim. Boulton had nothing to do with the transaction by which Mrs. Heath or others dealt with the property and turned part of it into freehold, and the defendant knew his assignee intended to do that if he could. There was no eviction by Boulton. The separation of the reversion in parts of the land does not put an end to the right to recover upon the covenant. In any event, even if the covenant for rent was gone, that as to the taxes must stand. Blake's assignment was the first dealing: *Newton v. Allen*, 1 Q. B. 518; *Morrison v. Chadwick*, 7 C. B. 283. There was no eviction of Blake; he

had the full enjoyment until he assigned. There was no discharge of Blake as surety, The covenant to pay taxes is very wide, and covers everything. All the taxes must be paid to save the tenant's lands. I refer to *The Ecclesiastical Commissioners of Ireland v. O'Connor*, 9 Ir. C. L. R. 242; *Orgill v. Kemshed*, 4 Taunt. 641; *Eaton v. Jaques*, 2 Doug. 456; *Auriol v. Mills*, 4 T. R. 94; *Woodfall's L. & T.* 13th ed. 403.

August 31, 1886. FERGUSON, J.—The action is brought to recover from the defendant certain rent alleged to be in arrear and unpaid under two indentures of lease, each bearing date the 31st day of December, 1877. One of these is a lease from the late John Boulton to the defendant of certain lands in the city of Toronto, being part of the property then known as “the cricket ground,” which included the lands now known and described as lots A, B, C, D, E, and F, according to registered plan 361. The other lease was made by John Cayley, surviving trustee of the marriage settlement of E. R. Cayley, wife of The Hon. Wm. Cayley, and E. R. Cayley and the Hon. Wm. Cayley to the defendant of lands, as is said, also a part of the lands then known as the “cricket ground,” which included lot G, according to the said plan 361. On the 1st day of May, 1881, this lot G, (the reversion in it) was duly conveyed and transferred to the late John Boulton. The plaintiff is the widow and executrix of the last will of the said late John Boulton. She is also, as appears by the probate of the will, devisee for life of the residue of his estate after payment of his debts, &c. At the trial a question was raised as to her right to maintain the action without joining her co-executor, and on motion leave was granted to add his name as co-plaintiff by way of amendment. The rent according to the provision in that behalf in each of the leases was payable quarterly on the first days of February, May, August and November in each year. The plaintiff alleges that on the 1st day of November, 1883, a quarter's rent became due in respect of these lots, and was not

paid, and that no sums for rent have since been paid by the defendant or by any one on his behalf since the 1st day of August, 1883, and she claims seven quarters' rent from 1st August, 1883, to the 1st May, 1885, at \$41.37 per quarter, amounting to \$289.59. She also states that the taxes chargeable against the said lots for the year 1880 became due and were not paid, and that no sums for taxes have been paid by the defendant or any one on his behalf since the year 1879, and that she has been obliged to pay, and has paid the taxes on the lands, which amounted to \$1155.17 (at the bar this was on calculation upon the evidence claimed to be \$1157.05). The leases purport to be drawn in pursuance of the Act respecting short forms of leases, and each of them contains a covenant on the part of the lessee (the defendant) to pay rent and to pay taxes.

The term in each of the leases is one ending in the year 1891. The plaintiff claims to be entitled to recover from the defendant these two sums of money and interest on the same from the 9th day of May, 1885, the day of the commencement of this action. She does not ask interest upon any of the moneys from any earlier period. She relies upon the covenants of the defendant to pay the rent and taxes.

On the 24th December, 1880, the late John Boulton by deed, which refers to certain matters which were apparently family matters and accounts, and recites the fact of a settlement of the same, conveyed a part of the lands embraced in the lease made by him to the defendant, to Mrs. S. A. Heath. This part did not, however, embrace any or any part of the lots or of any of them in respect of which the rent and taxes is now claimed. This deed is made subject to both the leases to the defendant. The reason, or a reason for making it subject to both these leases was, I apprehend, the existence of the peculiar provision in each of the leases in respect to the lessee's right of renewal, which seems shortly to be that he should not be entitled to claim a renewal of one without taking a renewal of the other. On the 15th day of April, 1880, the defendant by

deed assigned and transferred both the leases to James S. McMurray for the expressed consideration of \$10,000, and on the 29th day of June, 1882, McMurray assigned and transferred to John Canavan all his interest in the lots A, B, C, D, E, F, and G, the rent and taxes in respect to which are now claimed by the plaintiffs. Both McMurray and Canavan paid rent which was without any objection received by the lessor, the late Mr. Boulton, and some of it by the plaintiff after his death.

It appears that the motive and object of Mr. McMurray when he purchased the leases from the defendant was to obtain or procure a title in fee to the lands embraced in them, to divide the lands into building lots, make sales, &c. It was said (I do not know that this is of importance here) that he succeeded in procuring a title in fee to the parts belonging to Mrs. Cayley and Mrs. Heath respectively. He did not, however, succeed in obtaining such a title from the late Mr. Boulton. When Canavan purchased from McMurray it appears that he expected to succeed in procuring a title in fee from Mr. Boulton to these lots. He, however, failed in his efforts to accomplish this, and when he found that further effort to this end would be useless he ceased to pay rent. He says in his evidence, in effect, that a title to the lots as building lots for only the unexpired term, was for the purposes of sale useless, because no persons could be found who would purchase land and build upon it, having only such a title.

On the 11th day of April, 1885, the plaintiff brought an action against Canavan for the recovery of possession of these lots, and on the 23rd day of April, 1885, judgment by default was entered in that action. The record of the proceedings does not disclose the cause or breach for which the action was brought, but it was not disputed that the reason for bringing the suit was non-payment of rent and taxes, the lease containing the usual proviso for re-entry.

The plaintiff has, in pursuance of the judgment in her favour and against Canavan, taken possession of the lots. She now seeks to recover from the original lessee an apper-

tioned part of the rent reserved in the lease from the late Mr. Boulton to the defendant, and, as I understand, part of the rent reserved in the lease of Cayley to the defendant. At the bar there was some discussion as to whether or not, the action being against the original lessee, who had assigned the lease, and as it was said necessarily (under the circumstances) an action on the covenant resting in privity of contract and not in privity of estate, there could be an apportionment of the rent reserved by the lease from the late Mr. Boulton to the defendant. On this subject many of the older authorities were referred to and apparently relied on. The case *The Mayor, &c., of Swansea v. Thomas*, 10 Q. B. D. 48, which, I think, was not referred to, is a case in which some of the older cases, particularly *Stevenson v. Lambard*, 2 East. 575, are considered; and is, I think, an authority for saying that the rent reserved by the lease from the late Mr. Boulton to the defendant is apportionable, and that the action may be maintained for the part of it which on an apportionment would be considered the proper amount issuing out of or applicable to the lots A, B, C, D, E, and F, if there were nothing to be urged against its maintenance but the fact that the late Mr. Boulton had parted with his reversion in part of the lands embraced in the lease, and the same case, *Mayor, &c., of Swansea v. Thomas*, refers to authority for saying that the action can be maintained upon the covenant in the other lease, for the part of the rent thereby reserved properly apportioned to lot G, if there were nothing to be urged against its maintenance beyond the fact of the division of the reversion by the conveyance of this lot to the late Mr. Boulton. The defendant, as lessee, of course continued liable upon the express covenants in the lease, notwithstanding the assignment by him, and notwithstanding that the lessor accepted rent from the assignee. The lessor might at the same time sue the defendant (lessee) upon his express covenant and the assignee upon the privity of estate, but he could have execution against one only: *Woodfall's L. & T.*, 13th ed. pp. 260 and 261.

It was contended that there had been an eviction of the defendant by the lessor, and that such an eviction from the premises or any part of them suspends the right to recover upon the covenant to pay the rent, and that for this reason the plaintiff could not recover as to the rent sued for. Such an eviction is defined in many of the cases, and in modern, or comparatively modern cases, the definitions seem to be uniform. In the case *Oliver v. Mowat*, 34 U. C. R., at p. 475, Sir William Richards, then Chief Justice, in delivering the judgment of the Court, said: "The question of eviction was very much discussed in *Upton v. Greenlees*, 17 C. B. 64, where the Chief Justice, Sir J. Jervis, said, in giving judgment, referring to the present law on the subject of eviction: 'I think it may now be taken to mean this: not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the demised premises. If that may in law amount to an eviction, the jury would very naturally cut the knot by finding whether or not the act done by the landlord is of that character, and done with that intention. * * The question, therefore, of eviction or no eviction depends upon the circumstances, and is in all cases to be decided by the jury.'" Taking this as a definition of an eviction, and looking at the facts, what is shewn by the evidence and all the circumstances that appear? I am of the opinion that it has not been shewn that there was any eviction of the lessee by the landlord from the premises or any part thereof.

It was said that the character of the property had been changed, so that the lessee could not have the use of it that was intended at the time of the execution of the leases. It was argued that this was done with the assent of the late Mr. Boulton, and that the result was the equivalent of the destruction by the lessor of the identity of the thing demised, which amounted to an eviction, referring to *Upton v. Townsend*, and that the tenant, defendant, was not liable for subsequent rent. This argument is not, I think,

based upon facts. What is meant by the alleged assent of the late Mr. Boulton? Was it in his power to prevent what was done being done? He was not called upon, so far as I can perceive, to prevent others from doing anything, and when he was asked to change the character of the property he declined to do so, or at all events he did not do so. The evidence of Mr. McMurray, and in fact all the circumstances shew this. But, if required, what appears to me to be a further answer to the contention is this: When the defendant assigned his lease to Mr. McMurray he was quite aware of what was intended to be done with the property, and what would have been done with it if the intention could have been carried out. He was, in my opinion, a party to the act that was done in respect to the property which this contention complains of and the late Mr. Boulton was not a party to it. In the case *Carey v. Bostwick*, 10 U. C. R. at p. 161, the late Chief Justice Robinson refers approvingly to a passage in *Crabbe on Real Property*, which is as follows: "There shall be no extinguishment or suspension of rent when the whole is done by agreement, but only where the lessor enters injuriously and contrary to the will of the lessee."

Another contention for the defence was that as the landlord had accepted rent from the assignee of the lessee he had accepted such assignee as his tenant; that then the lessee, the defendant, became and was surety only for the assignee, and that the assignee having been discharged by the plaintiff the defendant was also discharged. The case *Moule v. Garrett*, L. R. 5 Ex. at p. 138, shews, I think, that under the facts that appear here the defendant may be said to be surety only, but I fail to see that the discharge of the principal contended for took place. It seems clear to me on the evidence that Canavan was not discharged by the plaintiff. The only thing that was done, or took place in his favour, was, that he was not charged any costs of the suit for the possession of the land, on the understanding that he would not defend the action. This, I think, did not operate a discharge of his liability what-

ever it was. McMurray was not, I apprehend, liable for this rent at all. The rent was all paid to the time of his assignment to Canavan and for some time afterwards. He may have been liable in respect of part of the taxes, but there is nothing, I think, to shew that the plaintiff, or the late Mr. Boulton discharged him.

Mr. Hodgins was mortgagee from Canavan. It was contended that he had been discharged by the plaintiff. The fact relied on was that he was paid \$50 for discharging the mortgage. He says in his evidence that he did this two or three days before he sent the deeds to plaintiff's solicitors. His letter with the deeds bears date the 4th December, 1885. This action was commenced on the 9th of May, 1885. I do not think I need further pursue this contention of the defendant.

The letter enclosing these deeds contains a copy of a passage in a letter from Canavan to Hodgins, which the defence endeavored to utilize for the purpose of shewing that Canavan had been discharged. It is, however, to be borne in mind that this letter was only received in evidence for the purpose of shewing the terms on which Mr. Hodgins delivered up the deeds, and that he (Mr. Hodgins) had then no right whatever to hold these deeds, he having prior to this time duly discharged his mortgage, the discharge having been duly registered.

I am of the opinion that this contention of the defendant also fails, and I may here say that after having considered the cases, the various contentions for the defence and the authorities referred to by counsel as well as I have been able, I am of the opinion that the plaintiff is entitled to recover in the action. The question, however, remains as to the amount she should recover.

As to the rent, the claim is for seven quarters. The defendant's counsel pointed out that the last one of these seven quarters would have fallen due, according to the leases, on the 1st day of May, and that the plaintiff recovered her judgment in the action against Canavan, and obtained possession of the property on the 23rd day of the

previous month of April, and urged that this quarter could not be recovered for. The difference between the parties in this respect will be but a small amount, for as has been determined by the case *Barnes v. Bellamy*, 44 U. C. R. 303, since the passing of the Act 37 Vic, ch. 10 (O.), rent is considered to accrue from day to day, and to be apportionable in respect of time accordingly. The date of the teste of the writ of summons in the action against Canavan is the 11th of April, and according to the case above referred to, that is the day up to which the rent accruing during the last quarter can be recovered. Then, as to the manner of the apportionment of the rent in respect of the different parcels of the lands under the leases. The plaintiff's witness on this subject fixed as the apportionment to lots A to F inclusive \$151.76, and to lot G \$14.12 = \$165.88 a year. This would be \$41.47 a quarter. What plaintiff's counsel contends for is \$41.37 per quarter. The defendant's counsel says that the mode of apportionment was upon an erroneous principle. Long since, and as I understand before the commencement of this litigation or the trouble out of which it arose, the defendant himself was asked by Mr. Boulton, junior, to apportion the rent, and he did so. The memorandum made by him is in evidence, according to which the amount is \$165.71 per annum, or \$41.43 per quarter, and, as I understand, this was the quarterly sum paid by the assignees while they continued to pay rent. Under such circumstances I think I am justified in saying that the amount should be as the plaintiff claims, \$41.37 per quarter, and I think the plaintiff should be allowed six quarters, and up to the 11th day of April in the seventh quarter. Had it not been for the statute, and the decision under it, I should have thought with defendant's counsel that the seventh quarter could not be recovered for.

The amount of the rent as I compute it is \$280.85 instead of \$289.59 as in the plaintiff's claim on the record.

As to the amount of the taxes for which the plaintiff makes her claim. The covenant as shewn in the second

column of the schedule is very comprehensive indeed. One can scarcely imagine how language could make it more so.

It was contended that there were certain local improvement taxes, amounting to \$132.56, that could not be recovered for, but looking at the scope of the covenant, I do not see how this contention can succeed. No authority was referred to shewing that the contention was correct.

It was also contended that the defendant should not be held liable in respect of the additions made under the Assessment Act, year by year, to the amount of the taxes in arrear, or in respect of any additions made by the municipality. This contention was based upon the reasoning that on each occasion of default by the covenantor the breach of the covenant was complete. I do not, however, take that view. No authority was cited in support of it.

I think that knowledge of the assessment law should be imputed to the covenantor. This, too, is a branch of the law that is generally known, and one can entertain no reasonable doubt that it was in fact known to the parties at the time the covenant was executed, and I think it a thing that, as a matter of law, should be considered as within the contemplation of the parties at the time of the making of the covenant, and, besides, the amounts of increase seem to me to fall within the meaning of the words of the covenant, as shewn in the second column of the schedule to the Act respecting short forms of leases: "All taxes, sales, duties and assessments whatsoever * * now charged or hereafter to be charged upon the said demised premises," &c.

Objection was also made to the evidence, or rather the character of the evidence, by which the plaintiff sought to establish the amount of the taxes. This, however, seemed to me purely technical, and I think the amount which the plaintiff paid that defendant should have paid was sufficiently shewn by the evidence to be \$1,157.05 in respect of taxes. It was objected that part of this was paid by her solicitors and not by her, but it was shewn that the payments were made with her moneys and for her.

The plaintiff is entitled to recover from the defendant for rent \$280.85, and for and in respect of taxes \$1,157.05, with interest on both sums from the 9th day of May, 1885, with costs of suit, and the judgment is accordingly.

G. A. B.

[QUEEN'S BENCH DIVISION]

THE ROSE-BELFORD PRINTING COMPANY V. THE BANK OF MONTREAL ET AL.

Cheque—"Payable at par" at a named bank—Effect of words—Liability—Right to charge back on dishonour.

The plaintiffs were the holders for value of a cheque drawn by the Mahon Bank on the Bank of Montreal, at London, on the face of which appeared the words "payable at Bank of Montreal, Toronto, at par." The cheque was deposited by the plaintiffs to their own credit with their bank at T., and in the usual course of business was sent by that bank to the Bank of Montreal at T., and by the latter bank was credited to the former. It was then forwarded to L., where it was dishonoured, and in due course was charged back by the Bank of Montreal to the plaintiffs' bank, and again by the latter to the plaintiffs. It appeared that the above words were habitually used by the Mahon Bank on their cheques with the assent of the Bank of Montreal.

Held, that the whole effect of the words was, that the Bank of Montreal at T. would make no charge for cashing the cheque, and that they did not assume the risk of there being funds to meet it, and that they did not lose the right to charge it back on ascertaining there were no funds.

THIS was an action tried before Armour, J., at the Toronto Summer Assizes, 1885, when it was adjourned for the production of certain books, &c. It was subsequently heard before him on the 26th January, 1886, when judgment was reserved.

It appeared that on 15th February, 1883, T. G. Davey, of London, purchased at the "Mahon Bank," in London, a cheque for \$254.86, drawn by that bank on the Bank of Montreal, London, in favour of the plaintiffs. Across the face of the cheque appeared the words, "payable at Bank of Montreal, Toronto, at par." The cheque was sent to the plaintiffs in payment of an account due to them by the

Railroad News Company, and was received by them on the 16th of February, and deposited in the Imperial Bank, Toronto, on the 17th, (Saturday.)

On Monday, 19th, the cheque was sent in the usual way by the Imperial Bank to the Toronto branch of the Bank of Montreal, and was credited by the latter institution to the Imperial Bank. The cheque was then sent the same day to London, reaching the Bank of Montreal there on the morning of the 20th. On that day the "Mahon Bank" closed its doors. The cheque was dishonoured and charged back by the defendants, the Bank of Montreal, to the defendants, the Imperial Bank, and by the Imperial Bank to the plaintiffs, who brought this action, contending (1) That the memorandum or note on the face of the cheque habitually used by the "Mahon Bank," without objection by the defendants, the Bank of Montreal, was an acceptance or guarantee by the said defendants of the payment of the cheque; and (2) That the cheque was in effect paid on presentation at the Bank of Montreal in Toronto, and the payment could not afterwards be revoked by charging back the cheque.

Falconbridge, Q. C., for the plaintiffs.

J. A. Worrell, for the defendants, The Bank of Montreal.

Bain, Q.C., for the defendants, The Imperial Bank.

May 10th, 1886. ARMOUR, J.—But for the words partly written and partly printed across the face of the cheque, "payable at the Bank of Montreal, Toronto, at par," it is clear under the authorities that the Bank of Montreal had the right to charge back the cheque to the Imperial Bank upon its dishonour at the London Branch: *Owens v. Quebec Bank*, 30 U. C. R. 382; *Timmings v. Gibbins*, 18 Q. B., 722; *Woodland v. Fear*, 7 E. & B. 519. I do not think that this legal right is altered by these words. The cheque is drawn on the London Branch and is payable at that Branch; these words do not change the place of payment; the cheque must be read to give effect to every part

of it, and so reading it it is clear that the whole effect of these words is a statement by the drawer that the Toronto Branch will make no charge for cashing the cheque, and I find that this was by agreement between the drawer of the cheque and the Bank of Montreal; but I do not think that upon the Bank of Montreal cashing the cheque they thereby assumed the risk of there being funds to meet it, and lost the right to charge it back upon its being ascertained that there were none. I think the plaintiffs must fail; but as these words were well calculated to mislead and have caused this litigation, and as I think the Bank of Montreal have contributed to raise this difficulty and cause this litigation by permitting, as I think they did, the drawers of the cheque to use this form of cheque, I will not give them costs. I therefore direct that judgment be entered in this cause, on and after the fifth day of next Easter Sittings, dismissing this action with costs as against the Imperial Bank, and dismissing it without costs as against the Bank of Montreal. I refer to *Prince v. Oriental Bank Corporation*, 3 App. Cas. 325.

[QUEEN'S BENCH DIVISION.]

McMICHAEL V. THE GRAND TRUNK RAILWAY COMPANY.

Railway company—Farm crossing—Duty to provide and maintain gate fastening—Negligence—Liability—47 Vic. ch. 11, sec. 9, (D.)

Plaintiffs' horses, in consequence of insecure fastening of the gates at the farm crossing, where the defendants' railway crossed their farm, got through the gates and on the railway track, and were killed by a passing train.

Held, that the plaintiffs, by reason of the continued use of the faulty fastening, could not be deemed to have adopted them as sufficient, and that it was the duty of the defendants to provide and maintain proper fastenings for the gate.

Section 9 of the Statute 47 Vic. ch. 11, (D.), commented on as to the nature of the duty cast on the plaintiffs to keep the gates closed; and, *Quære*, whether the words in that Act, that the owners must keep the gates closed, extend further than in respect of their own use of them; or whether if the gate, became open by any accidental means, or by the act of a stranger, and remained open without any person being near to prevent animals passing through it, the owner or occupier would be liable to the full extent provided by the Act, although it had become open without his agency or neglect, and remained so without his knowledge.

THE plaintiffs by their statement alleged (1) that they were the owners and occupiers of lot 19 in the third concession of the township of Kingston; (2) that the defendants were a railway company duly incorporated and having a portion of their railway on and crossing the said land of the plaintiffs, which said portion of their railway had been constructed and in operation for many years prior to and up to the happening of the grievances thereinafter complained of; (3) that it was the duty of the defendants to erect and maintain over said lot of land on each side of their said railway their fences of the height and strength of an ordinary division fence, with openings or gates, or bars, or sliding, or hurdle gates, with proper fastenings therein at farm crossings of the railway on said lot; (4) that the defendants, in apparent performance of their said duty, did erect fences along their said railway, and did at one of the farm crossings on said land, erect a gate therein, but not with proper fastenings, but, on the contrary, with an improper and defective and insecure

fastening, and the said gate was itself so constructed and erected as to open by its own weight when unfastened, all of which the defendants well knew; (5) that by reason of the breach of duty of the defendants, in not erecting and maintaining said gate with a proper fastening or fastenings, on or about the 20th of November, 1885, four horses of the plaintiffs, then lawfully pasturing on the said land of the plaintiffs adjacent to said railway, got through the said gate and upon the said railway, and were there struck and killed by a locomotive and train of cars of the defendants in charge of their servants; (6) that it was owing to the improper fastening of said gate, and owing to the want of proper fastenings that the said horses got through said gate and on to the railway, and but for defendants' breach of duty would not have got on said railway; (7) that the said horses having got on said railway, it was the duty of the defendants and their servants in charge of said locomotive and train of cars not to run against or strike said horses negligently or wilfully, if the same could reasonably have been avoided: that the said servants of the defendants saw the said horses on the railway just before the killing of them, in time to have slackened the speed of said locomotive, so as to avoid striking and killing said horses, but that the defendants, by their said servants, in breach of their duty in that behalf, so negligently, wilfully and carelessly, and wrongfully managed said locomotive and train of cars, that they did not slacken their speed, but, on the contrary, increased the speed thereof, and by reason of said breach of duty caused the death of said horses.

Plaintiffs claimed \$800.

Defence: Not guilty by statute (Consol. Stat. of C. ch. 66, sec. 83, and 42 Vic. ch. 9, sec. 27 (D.), both Public Acts)

Issue.

The cause was tried at the last Spring Assizes, at Kingston, before Cameron, C. J., and a jury.

It was proved that four of the plaintiffs' horses, which had been pasturing in a field of the plaintiffs, had escaped through the gate at their farm crossing on to the railway and were killed, and it was admitted that their value was \$295, and it was charged by the plaintiffs that they had so escaped through the fastenings of the gate being insufficient and improper; the fastenings were a staple and hook.

This evidence was given by Albert McMichael, one of the plaintiffs, on cross-examination. Q. Except for this accident, which you think arose from this cause, you would have considered the fastening perfectly secure? You always did? A. No, we were always afraid of it. Q. But you never said anything about it? A. Well, I am not bound to say anything about it. Q. Did you ever say anything about it? A. I have asked them to make the gates to swing shut. Q. The gates would not swing open unless the latch were raised? A. If the gates would not swing open this would not have happened. Q. After the latch was fastened the gates were perfectly secure? A. If they would stay so. Q. Perfectly secure gate? A. If it staid shut. Q. You never noticed the fastening? A. I never thought anything about it. Q. Never thought it was insecure before? A. Never thought it would unhook. Q. And if it had not been for this accident, you would have gone on supposing it was secure? A. Yes, would have gone on. Q. And when you tried it yourself you found it was secure? A. It did not unhook. Q. I understand you to say it was secure, because when it was fastened it was a secure gate? A. Yes. Q. Even when you shook it it remained secure? A. I may not have given it the right tap. Q. The fences and gates were secure? A. Yes. Q. You never made any complaint to the company about the gate? A. Except that it swung open. Q. It would not swing open if the fastenings were in? A. There is where the danger is. Q. It would not swing open if the fastenings were in? A. No.

Osmond McMichael said in his examination : Q. Had you known before this accident that this hook was liable to spring out ? A. No. Q. Had you ever tried it ? A. No, I had never jumped it out. And in his cross-examination : Q. The fastenings had always seemed secure enough to you ? A. Well, as far as I saw.

It was shown that the gate did not fit close to the post, but that there was about an inch and one-half play between it and the post, and that a sharp push against the gate would cause the hook to fly out of the staple ; and the gate being made to swing open, would at once swing open, and it was charged that the horses had pushed against the gate and had thus caused it to open.

The other facts material for the consideration of the case are fully stated in the judgment of the learned Chief Justice, hereafter set out.

There was no evidence called for the defence.

The learned Chief Justice submitted the following questions to the jury : (1) Was the fastening of the gate reasonably sufficient for the purpose of keeping the gate closed when first put on ? (2) Was such fastening, after it was first put on, kept in a reasonable state of repair ? (3) Did the plaintiffs' horses get through the gate on the railway track by reason of insufficient fastening, or by reason of the gate having been opened, and kept open by some person ? (4) If plaintiffs have a right to recover, what damages are they entitled to recover ? The jury answered the first two questions, "No." The third question, "By reason of insufficient fastenings" ; and the fourth question, "\$295."

The learned Chief Justice thereupon directed judgment for the plaintiffs for that amount, with costs, giving the following judgment :

CAMERON, C. J.—The plaintiffs sue the defendants for the value of four horses of plaintiffs killed by a train on the defendants' railway. The plaintiffs in their statement of claim charge that the defendants were guilty of negligence in the management of the train that killed the animals ;

also that it was their duty to maintain on each side of the railway, where it crosses the plaintiffs' land, fences of the height and strength of an ordinary division fence, with proper gates and fastenings therein at the plaintiffs' farm crossing. I was of opinion there was no evidence of any negligence in the management of the train, and did not allow that part of the case to go to the jury. The evidence upon the other alleged cause of action established that the fence on each side of the railway was sufficient; that the gates as gates were good, but were not sliding gates as required by the statute; and the fastenings the jury found were not proper fastenings. The fastening consisted of an iron hook attached to the gate by a staple, and a staple in the gate post into which the hook was dropped when the gate was shut. The hook and staples were sufficiently strong and reasonable fastenings, but were so placed as to be insecure. The staple in the post was not set horizontally in the post, but on a slant, the outer prong being placed lower than the inner or one next the gate, and the hook was placed on the gate lower than the staple on the post by three or four inches. The gate when fastened did not come close against the gate post, but had a space to move in or play of an inch and a half, by reason of which it appeared that the gate, when suddenly pushed against, would cause the hook to spring out of the staple, and the gate was so hung that when the hook was removed from the staple it would of itself swing open and remain so open. There was no direct evidence as to the way in which the gate became open when the horses escaped, but it was shewn that the horses were pasturing in a field adjoining the lane on which the gate was, and to which lane the horses had access; and the theory was that one or more of the horses had pushed against the gate and caused the hook to spring out and as soon as the animal moved away the gate swung open. The last time before the accident the gate was seen by the plaintiffs, or any one in their employment, it was closed and fastened.

The jury, in answer to questions submitted to them, found that the fastening of the gate was not reasonably sufficient for the purpose of keeping the gate closed when first put on, and was not kept in a reasonable state of repair; and that the horses got on the track by reason of insufficient fastening, and not by reason of the gate having been left open by any one. They assessed the damages at \$295. The fastenings, as already stated, appeared

sufficient as far as strength was concerned, and the only defect was the way in which they were attached to the post and gate. It appeared that the fastenings had been on for some years. The defendants contended that they were not liable, as the plaintiffs had used the fastenings without objection, and by virtue of section 9 of ch. 11, 47 Vic., the Consolidated Railway Amendment Act of the Dominion, the duty was cast upon the plaintiffs, as owners or occupiers of the farm, to keep the gates closed, and no person, whose cattle are killed by any train, owing to non-observance of the provisions of the section, can have an action against the defendants in respect thereof. I reserved judgment in order that I might more fully consider the force of the defendants' contention. I have done so, and do not think the clause applies to the circumstances of the present case. It appears to me that the jury were warranted in finding the fastenings were not properly put on; and to bring the defendants within the protection of the said 9th section of the amending Act there must one or two things occur, where the fastenings are insufficient—the opening of the gate by some one voluntarily, or an accidental opening, of which the owner or occupier has knowledge in sufficient time to close it before the happening of the accident. In this case, the jury have found, upon evidence that warranted the finding, that the gate was not left open, but became open through the insufficiency of the fastenings. The obligation of the defendants is to be found in section 16, sub-sections 2 and 3 of the Dominion Consolidated Railway Act, 42 Vic. ch. 9. This clause requires a railway company “to erect and maintain on each side of the railway fences of the height and strength of an ordinary division fence, with sliding gates, commonly called hurdle gates, *with proper fastenings*, at farm crossings of the road, for the use of the proprietors of the lands adjoining the railway. (2) Until such fences * * are duly made, the company shall be liable for all damages which may be done by their trains or engines to cattle, horses, or other animals on the railway. (3) After the fences * * have been duly made, and *while* they are *duly maintained*, no such liabilities shall be incurred for any such damages, unless negligently or wilfully done. By section 9 of the amending Act, it is enacted: “Persons for whose use crossings are furnished, *shall keep* the gates at each side of the railway closed when not in use; and any person on whose lands such gates shall be, shall be liable to a penalty of twenty

dollars for each occasion on which any such gate is left open without some person being at or near it to prevent animals from passing through it on to the railway. * * And the owner or occupier of the land on which any such gate shall be unlawfully left open as aforesaid, shall be liable to the railway company for any damages to the property of the company, or for which the company is responsible, by reason of such gate having been so left open; and no person, any of whose cattle are killed by any train owing to the non-observance of the provisions of the section, shall have any action against any railway company in respect to the same being so killed."

There is no doubt the section imposes upon the owner or occupier of the land the positive duty or obligation to keep the gates at his farm-crossings closed; but that is a duty that is imposed after the company has furnished the proper appliances for so doing, and while such appliances are maintained in proper repair. Section 16 of the Consolidated Act and section 9 of the Amending Act must be read together. When so read and applied to the facts of this case, the liability to bear the consequences of the killing by the defendants' train of the plaintiffs' cattle, has not been transferred from the defendants, to whom it would have attached before the amending Act, to the plaintiffs by that Act. To make the owner or occupier of the land liable the gate must, in the language of the statute, be unlawfully left open, and probably if the fastenings were of the proper kind, properly applied, if the gate became open by any means, and remained open without any person near to prevent animals passing through it on the railway, that would amount to an unlawful leaving open, for which the owner or occupier of the land would be liable to the full extent provided by the Act. It is not, I think, necessary to the decision of this case to go so far, and I should hesitate, in face of the very serious responsibility that might follow, to hold the owner or occupier liable where the gate became open through accident and not by the voluntary act of any one. But certainly that responsibility ought not to attach till the defendants, whose duty it is to provide the proper means to keep the gate closed, have done so. I must, therefore, direct that judgment be entered for the plaintiffs for the damages assessed, with costs. Mr. Nesbitt raised the objection, without pressing it, merely to leave it open to him to

urge it in a Court of Appeal, that section 16 of the Consolidated Railway Act did not apply to the defendants at all, and there was no statutory obligation upon them to fence the railway or maintain gates in the absence of special agreement with the land owner. The liability has been so often determined that the objection could not, as was conceded, have any weight in a Court of first instance, and I notice the objection merely to shew that it was taken.

May 20th, 1886, *W. Nesbitt* moved for an order *nisi*, calling upon the plaintiffs to shew cause why the findings of the jury, and the judgment entered thereon should not be set aside, and the same and judgment thereon be entered for the defendants, or a new trial directed between the parties, on the ground, amongst others, that the said findings were against evidence, and the weight of evidence, and the jury should have found for the defendants; and on November 17th, 1886, he moved by way of appeal from the judgment of the learned Chief Justice refusing a nonsuit and letting the case go to the jury, on the grounds that there was no evidence upon which the jury could reasonably find in favour of the plaintiffs; and by way of appeal from the judgment of the learned Chief Justice upon the findings of the jury subsequently directing judgment to be entered for the plaintiffs, on the ground that, assuming the findings to be correct as taken with the facts appearing in evidence, which were by agreement to be left to the Court to draw the inferences from, there was no liability upon the defendants. He cited *Studer v. Buffalo & L. H. R. W. Co.*, 25 U. C. R. 160; *Wood on Railways*, sec. 1553, *et seq.*

McMichael, Q. C., contra, cited *Wilson v. Ont. S. & H. R. W. Co.*, 12 U. C. R. 463; *Fossett v. G. W. R. Co.*, 1 Moore, P. C., N. S. 101.

ARMOUR, J.—In my opinion there was sufficient evidence to fairly warrant the jury in finding as they did, and their findings ought therefore not to be disturbed.

It was contended, however, that by reason of the continued user by the plaintiffs without complaint of the faulty fastenings, they had adopted them as sufficient and could not therefore complain of any injury caused to them by their insufficiency, and that therefore the learned Chief Justice should have dismissed the action.

This contention is not in my opinion well founded. It was the duty of the defendants to provide proper fastenings, and as the fastenings in question were those originally put on by the defendants, and they had equal means of knowledge as the plaintiffs of their sufficiency or insufficiency, the plaintiffs were not bound to give them notice of their insufficiency even if they had known of it; but the evidence shows that they did not know of it. What is said by the Court in *Studer v. The Buffalo & Lake Huron Railway Company*, 25 U. C. R. 160, is quite applicable to this case: "But the duty of maintaining appears to us to involve the duty of a continuous, watchful inspection, and that the defendants must take notice of the state of the fence at all times, and do whatever is necessary to maintain it as good and sufficient. Hence we cannot see that they were entitled to notice of its being out of repair. They were in the wrong when they suffered it to get into that condition." And it cannot be said that the plaintiffs adopted these fastenings as sufficient, so as to preclude their recovery of damages sustained by them by reason of their insufficiency; for they had no option of adopting or rejecting them, and they were not obliged to find fault with them, for it was the duty of the defendants to provide proper fastenings, and their sufficiency was the defendants' risk. See *Wilson v. Ontario, Simcoe & Huron Railway Company*, 12 U. C. R. 465.

It was contended, moreover, that the Act, 47 Vic. cap. 11, sec. 9 (D.), cast upon the plaintiffs the duty of keeping the gate closed, and, as a consequence, cast upon them the duty of seeing to the sufficiency of its fastenings. I agree with the learned Chief Justice that this provision does not affect this case, and that it does not affect the liability

of the defendants, nor relieve them from the duty and responsibility of providing and maintaining proper fastenings for the gates.

This provision raises some grave questions as to its application, scope, and effect, which it is unnecessary to discuss here ; but I desire to guard myself from seeming to agree in all respects with the construction put upon it by the learned Chief Justice, and to say that where and when it applies, it, in my opinion, imposes no greater responsibility upon the land owners to keep the gates closed than in respect of their own user of them.

This provision was enacted in consequence of the decision in *Brown v. Toronto and Nipissing R. W. Co.*, 26 C. P. 206, which has since been overruled by the Supreme Court, in *Erwin v. Canada Southern R. W. Co.*

In my opinion the motions should be dismissed, with costs.

WILSON, C. J., and O'CONNOR, J., concurred.

Dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

RIVER STAVE COMPANY V. SILL.

Fraudulent preference—Chattel mortgage—Insolvency of mortgagor—48 Vic. ch. 26, (O.)—Antecedent debt—Antecedent promise to give security—49 Vic. ch. 25, (O.)—Conflict of laws.

A company, incorporated in the State of Michigan, while in insolvent circumstances, had given a mortgage upon chattels in Ontario to defendant, a Michigan creditor, to secure previous cash advances made to the company under verbal promises by two directors that security would be given. The effect of the mortgage was to delay and prejudice other creditors and give defendant a preference over them.

Held, that under 48 Vic. ch. 26, (O.), without regard at all to any question of *bona fides*, pressure, or knowledge of the company's financial position by its officers, or by defendant, the effect alone of the transaction avoided it.

Held, also, that this mortgage was not given in pursuance of any antecedent contract or promise of the company, but even if it were that it could not be upheld, because it was not shewn to have been given in consideration of a money advance made in the *bona fide* belief that such advance would enable the debtors to continue business and pay their debts in full.

Held, also, that, the property mortgaged being in Ontario, the transaction was governed by the laws of Ontario without regard to the laws of Michigan.

THIS was an interpleader issue directed to try whether certain goods, seized in execution by the sheriff of the county of Lambton, were the property of the defendant as against the execution creditors, and was tried by O'Connor, J., without a jury, at the last Assizes at Chatham.

It appeared that the execution debtors were the St. Clair Timber Company, a corporation constituted under the laws of the State of Michigan, having its principal office at the city of Detroit, in that State, and its purpose being "the buying, cutting, rafting, transportation, and selling of all kinds of timber fit to be made into articles of merchandise, especially the producing of elm and other hardwood timber, and the ownership of all lands needed for the purposes of the corporation," and that such corporation was organized on the 26th of September, 1882.

It appeared that by the by-laws of this company, adopted on the 9th day of October, 1882, Article 6, that "The

directors, three in number, shall be elected by and from the shareholders at the annual meeting in October, and shall hold their offices for one year and until their successors are duly chosen." Article 7: "The officers of the corporation shall consist of a president, a vice-president, and a treasurer, who shall also act as secretary. Said officers shall be elected annually by the directors from their own number immediately after the election of directors, and shall hold their office for one year, and until their successors are chosen." Article 8: "The directors shall have the general control and management of the stock, property and business affairs of the corporation, etc." Article 9: "It shall be the duty of the president to preside at the meetings of the stockholders and directors; to sign all certificates of stock and all deeds of conveyance, * * and he shall have the right to vote at all meetings the same as any other shareholder or director." Article 10: "It shall be the duty of the secretary to attend all meetings of the board of directors, keep the minutes and records of all meetings of the stockholders and directors, and keep the books of the company. He shall also perform such other acts and things as may from time to time be assigned to him by the board of directors or president." Article 11: "It shall be the duty of the treasurer to attend all meetings of the directors, to receive and have in charge all contracts, bills receivable, deeds and other valuable or important papers; to take charge of the funds of the corporation, keep a strict account of all receipts and disbursements, and report the financial condition of the company from time to time as required by the board of directors. He shall join the president in signing certificates of stock, all deeds, and other formal documents and records, and perform such duties as may be imposed upon him." Article 12: "In the absence of the president all his duties shall devolve on the vice-president." Article 13: "The general execution, management, and conduct of the business of the corporation, subject to such limitations as may be

imposed from time to time, shall devolve upon the president and treasurer, who shall act either separately or conjointly, as the necessity of the business may require, in carrying on the general business of the corporation. They shall have the right and authority to buy and sell logs, employ or discharge men, and do all acts and things necessary and proper in carrying out the business of this corporation, save as in these by-laws or otherwise excepted. Each of said president or treasurer may sign or endorse cheques and promissory notes, drafts, and other commercial paper used in carrying on the business of the corporation; and in the absence of the president and treasurer either of the directors may sign or endorse any notes, cheques, or drafts necessary in the prosecution of the business; but under no circumstances shall any officer or director of the corporation in its behalf endorse or sign any contract, note, draft, or other paper, for the accommodation of any other person, firm, or corporation." Article 14: "No sale, conveyance, or purchase of real estate shall be made unless specially authorized by a resolution of the board of directors."

It further appeared that this company had acquired timber lands in the county of Lambton, and were there carrying on the business of cutting down and preparing for market the timber thereon, and of buying other timber, and the goods in question were goods acquired by them by their said business in the said county, and goods used by them in carrying on their said business in the said county: that in the month of January, 1886, the directors of this company were Collins P. Hibbard, John E. King, William H. Fox, Charles Fox, C. V. R. Townsend, John T. Sill, and Dunkin H. Sill: that Charles Fox was the president, William H. Fox the vice-president, and John T. Sill, treasurer and secretary: that the capital stock of the company was \$52,000, of which William H. Fox held \$4,500; John T. Sill, \$14,000; Dunkin H. Sill, \$8,000, and Lydia B. Sill, the defendant, \$1,000: that about the first of March, 1886, the said Collins P. Hibbard, John E.

King, William H. Fox, and Charles Fox, resigned as directors of the company; and at a meeting, purporting to be a meeting of the board of directors of the said company, held at the office of the company, on the 3rd of April, 1886, there being present the said C. V. R. Townsend, Dunkin H. Sill, and John T. Sill, C. V. R. Townsend moved that the meeting should proceed to the election of a president and vice-president, which was carried. Thereupon John T. Sill moved that Dunkin H. Sill be made president of this company, left vacant by the resignation of Charles Fox, which was carried. Thereupon John T. Sill moved that C. V. R. Townsend be vice-president of this company, which was carried. Thereupon C. V. R. Townsend moved the following resolution, which was carried:

“Resolved, that William H. Fox be requested and authorized to turn over to the treasurer of the St. Clair Timber Company, the 466 shares of stock of the Dawn Tramway Company, now held in trust by him, which were conveyed to him by a resolution of the board of directors, September 12, 1884.”

“Resolved, that the treasurer of this company be authorized to convey to Lydia B. Sill 466 shares of the stock of the Dawn Tramway Company, as security for money loaned to this company.”

“Resolved, that the president and treasurer be authorized to secure Lydia B. Sill by mortgage or bill of sale on any of the property of the company for money loaned to this company.”

“Resolved, that John T. Sill be authorized to convey to Lydia B. Sill, lot 26, 4th concession, north-east quarter of lot 22, 7th concession, lot 23, 6th con., east half lot 22, 6th con., and west half lot 29, 7th concession, of the township of Dawn, and any other lands he may deem fit to secure her loan.”

Lydia B. Sill was the mother of Dunkin H. Sill and John T. Sill, who were young men, unmarried, and who lived with her at her home in the city of Detroit, and her

claim against the company was for \$4,500, loaned on the 14th of January, 1886, \$2,000 on the 25th of February, 1886, and \$2,000 on the 3rd of April, 1886.

The said William H. Fox swore that he heard nothing of any loan made by her while he was director of the company, nor until after he had ceased to be a director, and between the 10th and 20th days of March, 1886: that the board of directors never authorized the borrowing of any money from her so far as he knew, and to the best of his recollection he attended all meetings of directors called, and up to the time he ceased to be a director he did not know that she was a creditor of the company.

Dunkin H. Sill said that he applied to her for the first loan: that he agreed to give her security for the loan, mentioning first railroad bonds: that he applied to her as representing the company: that he was simply a director: that he was representing and acting for it in Dresden, and had charge of the business there: that he did not give her the security simply by neglect: that when he applied for the second loan, she reminded him that he had not given her security for the first, but said she was willing to loan the money if he would see her secured, which he promised to do by the company: that he told her it would not be convenient to give her the bonds, but that they would give her a mortgage to secure her: that his authority for making that promise and the first promise, was simply on the ground that the company would feel morally bound to carry out his promise: that only three of the directors knew of the first and second loans, himself, John T. Sill, and C. V. R. Townsend: that he believed he made the application for the third loan, but he was not positively certain about it: that it was about the last of March.

On cross-examination he said he negotiated the loans but did not receive the money: that his brother received it: that he did not give his mother security until April, and then because she demanded it: she demanded it of him in Detroit: that he told her he promised to give it and she should have it: that he gave it in response to her

demand: that she and McCorkel, her attorney, both made the demand: that McCorkel made a written demand on him in Detroit.

Lydia B. Sill, the defendant, said that she loaned \$8,500 to the company in the sums and at the times above mentioned: that she raised the money by the sales of real estate and gave it to John T. Sill: that for the first loan the officers of the company promised to give her as security the bonds that they had: that she did not get them: that loan was for two months: that when the second loan was made they promised her that she should be thoroughly secured: that they could not give her the bonds, but that they would give her a mortgage on their property—she understood it was not particularly specified—on their chattels and other property that they held, other property of the company, she supposed she was to have it right away, she did not get it. On the third occasion they promised she should be secured for all the moneys that she had loaned on the property of the company: that she made the loan because her sons were interested in the company and they wanted to borrow the money: that she supposed the company was in good standing and had no suspicion of anything else: that she made the third loan on the 3rd of April, and did not get the chattel mortgage till the 14th of April, simply through neglect: that after making the third loan and before getting the mortgage she spoke to her sons and her husband and went to a lawyer Mr. McCorkel and instructed him to get her security for the loans she had loaned and left it entirely in the hands of her lawyer: that she took the security because she had loaned her money and felt she ought to have security: the second loan was to be for one month and the third for the same time.

On cross-examination she said that her son John sold real estate for her with her consent, and took by her orders the amount of the loans out of the proceeds of the sale: that the officers of the company who promised her security were her sons Dunkin and John: that she was promised a chattel mortgage: that they did not say on

what it would be, and she did not know what the chattel property consisted of: that it was not specified whether it was loose property or not: it was to be on their chattel property.

William F. McCorkel said that the defendant came to him to secure a claim that she had against the St. Clair Timber Company: that he made a demand upon Dunkin H. Sill, who was, as he understood, president of the company, for security for this claim of \$8,500. At that time he asked for a chattel mortgage, and Dunkin H. Sill agreed to give the chattel mortgage: that he went to Dresden and got an inventory of the property: that after getting the inventory he did not think the chattels sufficient security for the indebtedness, and he demanded other security: that he got a deed of 650 acres of land and 466 shares of the stock of the Dawn Tramway Company, also four notes of the Reid and Sill Cooperage Company, to the St. Clair Timber Company; one for \$2,500, two for \$1,900 cash, and one for \$703: that the chattel mortgage was executed on the 14th of April, securing \$8,500, payable in one month, with interest at eight per cent.: that it was under the seal of the company and signed by John T. Sill, the treasurer, and Dunkin H. Sill, the president, and that it covered all the chattel property the company had in the counties of Kent and Lambton; in fact, all their chattel property: that he took possession of it and was in possession of it when the sheriff seized: that the deed of the 650 acres was dated the 7th day of April, 1886: that according to the laws of the State of Michigan, a debtor, if the debt is *bond fide*, can secure one creditor in preference to another: that according to those laws the directors of an incorporated company can, by resolution, direct the officers to make transfers: that under the Act of incorporation the directors would have power to borrow and to mortgage property to secure a loan: that there was no limitation of their powers in that respect, unless they are limited by the by-laws passed by the stockholders.

It appeared from the evidence that at the time the chattel mortgage was given, and as far back as the previous January, the company were in insolvent circumstances and were unable to pay their debts in full. It appeared also that the money loaned by the defendant was expended for the purposes of the company.

The learned Judge found as follows: "I find that the defendant lent the sum of \$4,500, in January, 1886, and a further sum of \$2,000 in February after, at the request of her son Dunkin H. Sill, a director of the company, who was also employed as an agent to get out timber at Dresden. The loan of April was used at the request of her son John T. Sill, secretary and treasurer of the company, on a promise of being secured all her loans. On the 3rd of April a new board of directors was appointed, whether by the shareholders or not does not appear, but the prior board of directors was broken up by the resignation of a majority of it. I find that the defendant did not know as a fact, when she lent the money, what was the financial state of the company. I also find that when the money was loaned in April the company was insolvent, and that it was in doubtful circumstances from the early part of January before."

He thereupon ordered judgment to be entered for the plaintiffs.

On December 1, 1886, *Douglas*, Q.C., moved to set aside and reverse the said judgment on the following grounds: (1) that it was contrary to law and evidence, and the weight of evidence: (2) on the findings it should have been for the defendant: (3) that the learned Judge having found that the defendant actually advanced her money in good faith to the mortgagors, and that the same was used and applied by the mortgagors for the purposes of their business, and that the said advances were made on the promise, and in consideration of the mortgage being given at the time of such advances, and that the defendant did not know that the mortgagors were in insolvent circum-

stances, and the defendant being in actual possession under the said mortgage before the plaintiffs obtained their executions, and that the last advance was made on the faith and promise that the mortgage should be given at the time of said advance and to cover the previous advances, that the said mortgage should have been held to be a valid security and said judgment entered for her: (4) that the construction of the company was not open to objection by the plaintiffs, nor the authority of the directors to ratify the promise given to the defendant to give said mortgage, and the evidence showed that the promise given to the defendant was ratified by the mortgagors, and was sufficient, and related back to the said promise: (5) that it was not necessary, when on the evidence a loan was actually made in good faith by the lender without the knowledge of the borrower's insolvent circumstances, on the promise of a mortgage or other security for the money so advanced, the security being, as in this case, reasonable, that advancing the money and giving the security should be, as was held by the learned Judge in this case contemporaneous acts, and must be done at the same moment; but that giving the security in a reasonable time thereafter, in pursuance of the promise, fulfilled the requirements of the statute: (6) that the mortgagors and mortgagee in the chattel mortgage, the subject of the action, were domiciled in Detroit, Michigan, and residents of that city; and the mortgage was valid according to the laws of the domicile of the parties to the chattel mortgage, and the property passed by the mortgage according to the law of domicile, and therefore the mortgage was valid here and was not affected by the statute of this Province.

He referred to *Commercial Bank v. Corcoran*, 6 O. R. 572; Ex. p. Hemmingway, 23 Ch. D. 626; Ex. p. Homan, L. R. 12 Eq. 598; Brice on *Ultra Vires*, 263-8; *Walker v. Niles*, 18 Gr. 210.

Aylesworth, contra, cited *Davidson v. Ross*, 24 Gr. 22; *McRae v. White* 9 S. C. R. 22; 48 Vic. ch. 26 (O.)

December 23, 1886. ARMOUR, J.—It was not found as a fact by the learned Judge whether all the money advanced by the defendant was advanced before the meeting of the directors of the company on the third of April, 1886, or not. It is quite clear that the first two advances were so made, but the doubt is about the third. Dunkin H. Sill said that he applied to the defendant for it about the last of March. The defendant said she made it on the 3rd of April; but as the money advanced was never in her hands, but was taken by her son John T. Sill by her verbal order out of the proceeds of real estate sold by him for her, and as she made no entry or memorandum of it, and had nothing in writing to refer to in regard to it, it may be that she was mistaken in assigning that as the day on which the advance was made. The resolutions speak of the “money loaned” as if it were a past transaction, and if the money were not advanced till after that meeting the security given for it would not be authorized by these resolutions. McCorkel said that after he demanded the chattel mortgage from Dunkin H. Sill, and he expressed his willingness to give it, he went to Dresden to get an inventory of the chattels, and having obtained it that he did not consider them a sufficient security for the indebtedness and demanded other security; that he thereupon got a deed of 650 acres of land and a transfer of 466 shares of the capital stock of the Dawn Tramway Company. Now the deed of this land is dated the 7th day of April, 1886, and the authority to give the chattel mortgage, the deed, and the Dawn Tramway Company stock, is all contained in the resolutions passed at that meeting.

It would seem to me, therefore, that that meeting must have been held after McCorkel had obtained the inventory of the chattels and had found them insufficient and had demanded other security, and consequently some time after the third advance was made by the defendant. It would also seem to me, from the fact that the only business transacted at that meeting was the appointment of a president and vice-president, and the passing of the resolutions to

secure the defendant for the money loaned by her, that that meeting was had for the express purpose of enabling security to be given to her, and for no other purpose. I think that the true conclusion of fact from the evidence is, that all the money was advanced prior to that meeting, and that the last advance was made some days at least prior to that meeting.

The only effect of the resolutions passed at this meeting was to recognize the fact that the defendant was a creditor of the company in respect of money loaned by her to it, and to authorize the proper officers of the company to give her the security therein named for the money so loaned.

We have thus this company, being in insolvent circumstances, making this chattel mortgage to the defendant, which had the effect of defeating, delaying, and prejudicing its creditors, and of giving the defendant a preference over its other creditors, and the law says that under such circumstances it shall, as against them, be utterly void.

The object and intention of the Legislature in passing the Act 48 Vic. ch. 26 (O.) was to compel, so far as it had the power, all persons in insolvent circumstances or unable to pay their debts in full, or knowing themselves to be on the eve of insolvency, to treat all their creditors alike by making such a disposition of their assets as would pay all their creditors their just debts ratably and proportionably, and without preference or priority.

I think that in applying this Act we have only to ascertain whether the person who has made any gift, conveyance, assignment, &c., was at the time in insolvent circumstances or unable to pay his debts in full, or knew that he was on the eve of insolvency, and if so, what is the effect of such gift, conveyance, assignment, &c., and if its effect is to defeat, delay, or prejudice his creditors, or to give any one or more of them a preference over his other creditors, or over any one or more of them, to declare such gift, conveyance, assignment, &c., as against them to be utterly void.

I think that we ought to give effect to the plain words of the Act, and ought not to import into the Act anything that is not plainly expressed therein.

I do not think that in construing the Act, where we find that the person who has made the gift, conveyance, assignment, &c., was at the time in insolvent circumstances or unable to pay his debts in full, or knew that he was on the eve of insolvency, we ought to be affected by any such considerations as that the gift, conveyance, assignment, &c., was made in good faith, or through pressure, or in ignorance of his circumstances, if he was actually in insolvent circumstances, or was actually unable to pay his debts in full, or as that the person to whom he made such gift, conveyance, assignment, &c., took it in good faith, or took it without knowing his circumstances; but we ought to look only at the effect it has had upon his other creditors, and deal with it accordingly.

It was contended that the chattel mortgage given to the defendant could be upheld, because, as was alleged, it was given in pursuance of an antecedent contract or promise.

In *Ex parte Fisher, In re Ash*, L. R. 7 Ch. 636, Mellish, L. J., said: "We agree that the authorities establish as a general rule, that where a sum of money is advanced upon the faith of a contract that a bill of sale shall be given, the sum so advanced is to be treated as advanced upon the credit of the bill of sale, and is not to be considered as a past debt; and, also, that an assignment by a debtor of all his effects partly as a security for a past debt and partly as a security for a substantial fresh advance, is not necessarily an act of bankruptcy."

And with regard to such an antecedent contract, Jessel, Master of the Rolls, in *Ex parte Wilkinson, In re Berry*, 22 Ch. D. 788, said: "And it appears to me that if it is a *bond fide* promise, made not for the mere purpose of securing the existing debt, but to enable the debtor to carry on his business as before, if it is a *bond fide* arrangement on both sides, the mere fact that there is not a technically binding contract to make further advances is not sufficient to lay the arrangement open to the objection

that it was made to defeat or delay creditors, and therefore fraudulent and void as an act of bankruptcy."

I assume from this that when a sum of money is advanced upon the faith of a promise that a chattel mortgage shall be given to secure it, the promise need not be a binding contract in the sense that the specific performance of it could be enforced in equity, or damages for the breach of it recovered at law, but I think that the promise, such as it is, must be made by the person who is to give the chattel mortgage, or by some one authorized by him.

In this case the promises made were made by Dunkin H. Sill and by John T. Sill at a time when the former was only a director of the company, and the latter, besides being a director, was also secretary and treasurer of the company, and I fail to see that they, in their respective capacities, had any authority to bind the company to carry out these promises; and I do not think, as was contended, that the resolutions at the meeting of the 3rd of April contain any recognition of their authority to bind the company by such promises.

I am inclined to think, however, that this chattel mortgage could not be upheld even if an antecedent contract or promise to give it, binding upon the company, had been established; and this is shewn by the exception in the third clause of the Act from the operation of the second clause of any *bonâ fide* gift, conveyance, assignment, transfer, or delivery over of any goods, securities, or property of any kind as above mentioned, which is made by way of security for any present actual *bonâ fide* advance of money; and this chattel mortgage was not given for any present advance of money, but for a past one.

It was also contended that the chattel mortgage in question could be upheld because the last advance was made upon the faith of a promise that the whole should be so secured. This promise was, as I have already shewn, not binding upon the company; but even if it were, I do not think that this chattel mortgage could be upheld; and this is shewn by the exception in the third clause of the

Act, as amended by 49 Vic. ch. 25 (O.), from the operation of the second clause of a security given to a creditor for a pre-existing debt, where by reason of or on account of the giving of the security an advance in money is made to the debtor by the creditor in the *bonâ fide* belief that the advance will enable the debtor to continue his trade or business and to pay his debts in full, and it was not shewn that when the defendant made the last advance she did so in such *bonâ fide* belief.

It remains to consider the contention of the defendant's counsel, that as the mortgagors and mortgagees were both domiciled in Michigan, and the mortgage was valid according to the laws of that State, the mortgage could not be affected by our laws, although the property mortgaged was within our territory and jurisdiction.

The law as to this contention is well and tersely stated in *Clark v. Torbell*, 58 N. H. 88, by Foster, J.: "Every State has entire jurisdiction over all property, personal as well as real, within its own territorial limits, and the laws of the State regulate and control its sale and transfer, and all rights which may be affected thereby. If a foreigner or citizen of another State send his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations in force in the country where he places it. What the law protects it has the right to regulate. And if two persons in another State choose to bargain concerning property which one of them has in a chattel not within the jurisdiction of the place, they cannot expect that the rights of persons in the country where the chattel is will be permitted to be affected by their contract." See also *Rice v. Courtis*, 32 Vermont, 460; *Milne v. Morton*, 6 Binney 361; *Green v. Van Buskirk*, 5 Wallace 307 and 7 Wallace 139; *Story on Confl. of Laws*, 8th ed. 383-394.

The motion must be dismissed, with costs.

WILSON, C. J., and O'CONNOR, J., concurred.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

BELL TELEPHONE COMPANY V. BELLEVILLE ELECTRIC
LIGHT COMPANY.

License from municipal corporation—Telephone and Electric Light Companies—Interference by second licensee with rights of first—R. S. O. ch. 157, secs. 59, 70 ; 45 Vic. ch. 19, sec. 3, (O.)

An interlocutory injunction having been granted to restrain defendants, who were carrying on business in partnership as an Electric Light Company under license from a municipal corporation, from running their lines in such a way as to interfere with the safe and efficient working of the business of the plaintiffs, an incorporated Telephone Company, also licensees of the corporation, under authority granted two years previously to the defendants' license,

Held, that, although the circumstance that the plaintiffs were in possession of the ground, and had their poles erected about two years before the defendants put up their poles, did not give them the exclusive possession or right to use the sides of the road on which they had placed their poles, yet, their possession being earlier than that of the defendants, the defendants had not the right to do any act interfering with or to the injury of the plaintiffs' rights.

Held, also, that independently of the provisions of R. S. O. ch. 157, secs. 59 and 70, as extended to Electric Light Companies, 45 Vic. ch. 19, sec. 3, (O.), the plaintiffs were entitled to relief on the general ground upon which protection and relief in cases of this kind are granted.

Quære, whether defendants were liable to indictment.

S. G. Wood moved for an injunction to restrain the defendants, their servants, &c., from erecting or keeping erected their poles and carrying their lines or wires and conducting electricity near to the poles, lines, and wires of the plaintiffs at any point on the Station Road, between Emily street and Bleeker Avenue, in the city of Belleville, or otherwise than on the side of the said road opposite to that on which the lines and wires of the plaintiffs' company were erected and carried, and from stringing or affixing their wires at the point or points where they crossed or should thereafter cross the said road at a less distance than four feet above the wires of the plaintiffs' company.

It appeared from the affidavits filed on behalf of the plaintiff company that they had commenced their business in Belleville in 1882, and ran their wires on the Station Road in 1884, and had continued there since then ; that

in June, 1886, the defendants strung their wires on four poles on the Station Road, which were only twenty-five feet in height and were placed in such positions that the wires affixed to them were immediately underneath and only about two feet below the plaintiffs' line: that the proximity of the defendants' wires to those of the plaintiffs occasioned great danger from the risk of the wires of the latter breaking and falling on the defendants' wires, the effect of which would be that the current of electricity would be diverted from the electric light wire to the telephone wire, whereby fire would be produced at the end of the telephoneline, destroying the telephone instruments and endangering the building in which the instruments were. It was shewn that if a telephone or electric light wire charged with electricity fell on a living being death or serious injury might ensue, and that numerous accidents of this nature had occurred. It was also stated that from the relative positions of the two lines the plaintiffs were exposed to interruption and difficulty in carrying on their business from induction, "by which the powerful current used for electric lighting affects all wires and metallic conductors near the electric light wires by the current passing from the latter wires to the telephone wires, the effect of which was to cause the telephone wire to emit through the receiving instruments a loud noise which seriously interfered with and often entirely prevented audible and intelligible conversation over the telephone, as it often drowned the sound of the voice."

Several of the affidavits made by practical electricians stated in effect that the only way of avoiding the inconvenience and danger complained of was to have the respective lines of the two systems run along opposite sides of the road from each other.

The affidavits on behalf of defendants stated that in many parts of the city the wires of the two companies ran much nearer each other than they did at the place complained of on the Station Road, "running along side over and under, and crossing each other, and in several places

almost touching each other:" that the defendants' wires had been run on the Station Road at the places complained of in order to avoid a row of trees.

Several affidavits made by persons in the habit of using the telephone line denied that communication was interfered with between the city and the station by induction. It was shewn that the lines of both plaintiffs and defendants had been erected under authority from the municipal council of Belleville, and under the supervision of the street surveyor. It was also stated that the defendants line had been inspected under instructions of the Underwriters Association, and that the person who made the inspection had told the defendants that their line was all right for the purpose of insurance.

The plaintiffs put in the following publications: "*The Electrical Review*, published in New York, of the 12th of January last, in which there was the following paragraph: "In Youngstown, Ohio, the Status of things is reversed. The Central Union Telephone Company has obtained an injunction against the Electric Light Company there, which restrains the latter from so placing their wires as to work damage or danger to the property or persons of the Telephone Company. The Central Union people have been unfortunate through neighbouring with these giants of electricity. Their offices at Dayton and Toledo have been partially wrecked through contact between telephone and electric light wires, and occasional scorchings have occurred elsewhere."

Again, in the same publication of the 25th September last, it was said: "Outside wires are full of expedients for getting a plant into trouble," [that is, an *electric light* plant.] "Where they are building, if there are other wires either electrical or guy or stay wires, contact with these may mean a heavy loss in a block half a mile away. If the wire is a telegraph, telephone, police, or fire wire, its capacity for carrying is not equal to that of the electric light wire."

If the current is deflected from its proper wire to the central office of the company, whose wire is thus crossed, circumstances alone will decide what damage is to be paid for. Some years ago a small loss occurred which may serve to illustrate this phase of danger. A temporary line was run from a plant in the same block to furnish light for an evening entertainment; the wire was not insulated properly, and during the existence of this additional current a rain storm wetted the surface where the electric light wire rested and formed a road for the current to a telephone wire. The telephone wire bore the indignity well enough until it reached the fine wire cable in the exchange. There it would stand the insult no longer and it burst into fire. The wire was too small to carry the current thus thrust upon it, and diminished size, as we have seen, means increased resistance, and resistance means heat."

It then referred to leaks along the electric wire, and it proceeds: "If the line is a better conductor than the ground more current will traverse the wire than waste at the leaks. If one of them happened to be a telephone wire a fire might be the result, and if one of them happened to be an underwriter a funeral might be in order; but if either of these occurred and there were no other *grands*" (a technical expression) "on the line there would be no work either for the adjuster or the coroner. * * * In my opinion no wire for electrical purposes should be allowed above ground. While these are permitted to swing in the air from poles and housetops contact with other wires is almost certain, and where there are telephone, telegraph, or other grounded wires, the result, if one such is crossed with an electric light wire, might be disastrous. With these in the ground or on the ground the wind and the weather can have no effect, and such a thing as a cross would be next to an impossibility."

The plaintiff also put in the *Electrician and Electrical Engineer*, for October, 1886, in which there was a very important article, in which the chairman of the legal committee reported among others upon the following matter:

“First—The legal relations of an electric light company to a telegraph or telephone company in relation to the interference with telegraph or telegraphic business by electric light currents.”

The second part need not be noticed.

The first part of the report suggested the following question: “How far has a telephone company a legal remedy for interference with business due to a necessary incident of electric lighting, for instance, as induction?”

The writer said that in most cases the telephone companies were in possession of the field, although he did not rely much upon that, but more upon the general rule that no man should use his own property within reasonable limits to the injury of another. The writer then went on to say: “Electric light wires and those telephone and telegraph companies can be used in the same district, and if properly arranged will interfere to a very small extent with one another; but this harmonious operation of the two systems is only possible when some care is taken to prevent the difficulties; such as, for instance, hanging the wires far enough apart not to influence one another injuriously. If, however, an electric company were to insist on placing its conductors so close to telephone wires as to cause injury to the telephone business, there would certainly be a remedy by way of injunction and damages at the command of the telephone company.”

At page 385 reference was made to a case in which an injunction at the instance of a telephone company was granted against an electric light company for erecting its poles and stringing its wires in such close proximity to the telephone wires and poles as to impair the usefulness of the latter; and at page 389, it was said: “Experience has proved that it is just as fatal to life to come in contact with the wire when it is wet, as it would be to come in contact with the marked upper wire. Two men have recently lost their lives in this city by accidentally touching the covering of an electric light wire when

it was damp. The Western Union Telegraph Office and the jewellery store of Durham & Co., in this city were set on fire about five o'clock in the evening during a light rain by some one throwing a short piece of wire from a building in such a manner as to make a contact between an electric light wire and a telegraph wire. * * * Notwithstanding the fact that the use of uninsulated or *underwriter's wire* has within the past two years caused the death of at least 100 persons and destroyed property to the amount of over half a million of dollars in the United States, yet we see the new companies following in the footsteps of the older ones and subjecting themselves to heavy damages that may result from loss of life and property. To make matters worse they attempt to construct their lines parallel to and on the same sides of the streets with telegraph and telephone wires, and thus bring about litigation which costs them fourfold more than it would have cost to string well insulated wires. It is apparent to any one that where two sets of wires are strong, powerful, one above another, or below the other, that they will come in contact during storms or fires—in fact, it is impossible to prevent frequent contacts. Whenever there is a contact it means a fired telegraph office or telephone exchange, possibly death to some employé. Every residence or block that has a wire of any kind connected with it is liable to be set on fire at any moment by a contact between the various wires which form such a network throughout every city. Telephone employés inform us that it is a very common thing now to find telephones that have been set on fire at night and burned up, the charred remains having fallen to the floor. I know that the electric light experts will go on the stand and swear that one *ground* or *cross* will not cause the electric light current to be deflected from the its regular channel *when the balance of the circuit is insulated*, and they tell the truth, but not the whole truth: the trouble is *the balance of the circuit is never insulated*. It is very well known among the electric light people that the insulation of their circuits is uniformly low, and when one good *ground* is established

by the crossing of wires, the intense electric light current immediately establishes a second *ground*, and in this way the currents leave their proper channel."

S. G. Wood, for plaintiffs, referred to Dominion Statutes 43 Vic. ch. 67; 45 Vic. ch. 95, and Ontario Statute 45 Vic. ch. 71, under which the plaintiff company derived their powers; 45 Vic. ch. 19, sec. 3, O.; R. S. O. ch. 157, secs. 58, 59, 70; *Cunningham's Law of Electric Light Companies*, pp. 33, 115; *Griffith v. Blake*, 27 Ch. D. 474; *Lee v. Haley*, 18 W. R. 181; *Siddons v. Short*, 2 C. P. D. 572; *Hepburn v. Lordan*, 2 H. & M. 345; *Kerr on Injunctions*, pp. 16, 53; *Fletcher v. Rylands*, L. R. 1 Ex. 265, affirmed, L. R. 3 H. L. 330; *Pollock's Law Quarterly Review*, January, 1886, p. 52; *Broom's Maxims*, 360; *The Electrician and Electrical Engineer*, Oct. 1886, 372, 385, 389; *Electrical Review*, June 12th, 1886, p. 5; *Electrical Review*, Sept. 25th, 1886, pp. 1, 2, 4.

G. D. Dickson, Q. C., referred to *McLaren v. Caldwell*, 5 A. R. 363; *Hathway v. Doig*, 6 A. R. 264; *Elwes v. Payne*, 12 Ch. D., 468; *Graham v. Swan*, L. R. 7 App. Cas. 547; *High on Injunctions*, 413.

December 7, 1886. WILSON, C. J.—The plaintiffs are an incorporated company under the 43 Vic. ch. 67, (D.) and the 45 Vic. ch. 71, (O.)

By the former Act, assuming the Parliament of Canada had the power to pass it—see Confederation Act, section 91, sub-sec. 29 and the following paragraph—and by section 92, sub-secs. 10*a.*, 10*c.*, 11, 16, the plaintiffs acquired very extensive powers:

To manufacture telephones and other apparatus connected therewith, &c.

To purchase, sell, or lease the same and rights relating thereto.

To build, &c., to purchase, &c., to maintain and operate, or sell or let any lines for the transmission of messages by telephone in Canada or elsewhere.

To make connection, for the purpose of telephone business, with lines of any telegraph or telephone company in Canada or elsewhere.

To aid, to build, or work any such telephone lines : section 2.

To construct, &c., its lines of telephone along the sides of and across or under any public highway, &c., either wholly in Canada, or dividing Canada from any other country, provided the company shall not interfere with the public right of travelling on or using such streets, &c. Not to construct any pole higher than forty feet above the street ; nor to affix any wire less than twenty-two feet above the street ; nor carry more than one line of poles along the street without the consent of the municipal council. Where telegraph poles are already constructed, not to erect poles in any city, town, or incorporated village on the same side of the street where such poles are already erected, unless with the consent of the municipal council ; nor to cut down or mutilate trees, &c. : section 3, and see also section 4.

By the Ontario Act it is recited " that doubts have arisen as to the powers of the said company under the Act," [the Dominion Act] " in regard to those portions of its work and undertaking which are local and do not extend beyond the limits of the Province" ; and the Act then confers powers upon the company, which it may exercise within the Province of Ontario : section 1.

Section 2 is substantially like to section 3 of the Dominion Act, excepting in one respect, hereafter mentioned ; and section 3 of the Ontario Act is substantially the same as section 4 of the Dominion Act.

The principal provision in both Acts is that the Telephone Company " may construct and maintain its lines of telephone along the sides of and across or under any public highway, street, bridge, watercourse, or other such places," not interfering with the public rights of user or travel.

In the Dominion Act the section enacts that the company shall not carry " *more than one line of poles along any street* without the consent of the municipal council ;"

while in the Ontario Act it is that the company shall not carry *any such poles or wires* along any street without the consent of the Municipal Council. That consent was given.

The defendants are not an incorporated company. They are a private partnership. There is an Ontario Act, the 45 Vic. ch. 19, intituled "An Act respecting companies for supplying electricity for the purposes of light, heat, and power." That Act by section 3 makes sections from 50 to 60 inclusive, and sections 62 to 85 inclusive, of the R. S. O. ch. 157, parts of the Act of 1882; and by that means sections 59 and 70 of the former Act are made parts of the latter Act.

Section 59 is: "Every such company shall construct and locate their [gas and water] works and all apparatus and appurtenances thereunto belonging or appertaining, or therewith connected, and wheresoever situated, so as not to endanger the public health or safety." Section 70: "Nothing in this Act shall authorize any company established under it to interfere with or infringe upon any exclusive privilege granted to any other company."

It appears the plaintiffs were in possession of the ground for the erection of their poles, and that they had their poles erected about two years before the defendants put up their poles. That, however, did not give them the exclusive possession or right to use the sides of the roads on which they had placed their poles, even if they had the independent right to use the sides of the roads under the Dominion Act, without the consent of the municipal council. It is not necessary to say whether the Dominion Act or the Provincial Act is the Act under which the plaintiffs have the right to exercise their powers—that is, whether they have the right to use the road sides for their poles without the leave of the municipality, or only with such leave according to the Ontario Act.

It is sufficient to say that being in the earlier possession of the ground required for their poles the defendants have not the right to interfere with or do any act to the injury of the plaintiffs' earlier right. The defendants

would not have the right to cut down or remove the plaintiffs' poles, nor to make use of them, nor to place wires or do anything else which would damage the purpose or usefulness of the poles or wires which the plaintiffs had placed there; nor to render useless or prejudice the business which the plaintiffs were and are authorized to carry on by means of their poles and wires; nor to cause danger to life or property by stringing their wires so near to those of the plaintiffs that life or property is endangered thereby.

There is abundant testimony that placing the wires of these parties too near to each other,—and the later erection would be the act of the wrongdoer,—while the instruments are in use, or in electrical storms when they are dangerous, has not only destroyed property by fire but has destroyed human life; and the instances of such accidents are more numerous than those who do not give much attention to these matters would suppose; so numerous that in many parts of the United States special legislative interference has been urgently called for, and to such an extent as to prohibit the placing of electric light wires on the same side of the road upon which either telegraph or telephone wires are strung; for although the electric wires may be a few feet distant from the others, either on parallel lines, or above or below the others, some accident may connect the two wires, by breakage of one of them, or otherwise, that danger may be caused.

It is also said it is difficult to preserve complete insulation, and that if the material used for it becomes wetted the insulation is destroyed, and the covering of the wire is no greater protection against induction than is the exposed wire. How far the defendants could be indicted, see *Regina v. Lister Dears and Bell*, C. C. 209; *Hepburn v. Lordan*, 11 Jur. N. S. 132, 2 Hem. & M. 345.

I am quite satisfied there is and must be danger from accident or neglect to be apprehended from these two wires running parallel to each, or the one above or below the other, in the proximity of the one to the other, as represented in the evidence, and that the defendants are the wrong-doers in this respect; that they are the persons

who, while the plaintiffs were, I may say, in possession of the ground, have placed their poles and wires in that position of danger towards the works of the plaintiffs.

That not much harm has been done to the plaintiffs so far, according to their own account, is fortunate for both parties—that it may happen at any moment may reasonably be feared, but what the extent of that harm may be either to life or property, cannot be limited or defined. The R. S. O. ch. 157, secs. 59, 70, which are part of the 45 Vic. ch. 19, sec. 3 (O), have some connection with the application.

But independently of these general provisions the plaintiffs are entitled to relief on the general and common grounds upon which summary protection and relief in cases of the kind are granted.

The fact that the City Engineer located the defendants upon the side of the road in question will not give the defendants an indefeasible right to maintain their poles and wires as against the plaintiffs upon the site so assigned to the defendants. The plaintiffs have the first right; they have always opposed the defendants' right to have their poles where they are, and the City Council had not the right to destroy or prejudice the privilege they had already granted to the plaintiffs.

I think the plaintiffs are entitled to the relief they ask, and I am glad to say it cannot be a very serious matter to the defendants if the whole cost of transferring their wires to the other side of the road will cost only \$10.

In my opinion the defendants must be ordered to remove their poles and wires to the other side of the road in question, that is, to the side of the road on which the plaintiffs have not their poles and wires; and that the defendants do pay the costs of this application. The order will be in the usual form, to proceed with the trial of the action, to pay damages, &c.; the removal to be made on or before 30th inst.

Judgment accordingly. (a)

(a) Since the delivery of the above judgment the defendants have submitted, and consented to an order going for a perpetual injunction.—REP.

[CHANCERY DIVISION.]

RE ONTARIO LOAN AND SAVINGS COMPANY

AND

POWERS.

Will—Devise—Life estate—Appointment.

A. by his will devised as follows : “ I give and bequeath to my nephew B., and C. his wife, (describing the land), to their use for the term of their natural life, and at their decease to be divided among their children as they may see fit.” C., the wife, died, and after her death B. conveyed to one of his children, D. B. and D. then mortgaged to the company, and the company sold to E. under the power of sale in the mortgage, but E. refused to take the company’s title.

Held, That B. and C. took an estate for life only : that the appointment in favour of one child to the exclusion of the rest was not a valid appointment, and that the title offered was not one that the purchaser could be compelled to accept.

Semble. Had a similar appointment been made by both husband and wife it would have been invalid.

THIS was an application under the Vendor and Purchaser Act, R. S. O. ch. 109.

The property was being sold by the Ontario Loan and Savings Company to one Arthur Powers, under a power of sale contained in a mortgage made by Elroy Johns Covey and Nathan Johns Covey to the company, and the question was whether they had the right to make such a mortgage so that the company could make a good title under the power of sale contained therein.

Nathan Johns Covey took the property under the following devise in the will of his uncle (Eldred Johns Covey the former owner) : “ I give and bequeath to my nephew Nathan Johns Covey and —— Covey his wife (describing the land) to their use for the term of their natural life, and at their decease to be divided among their children as they may see fit.” Nathan Johns Covey’s wife died, and subsequent to her death and on April 25, 1882, Nathan Johns Covey conveyed to one of his children Elroy Johns Covey. Elroy Johns Covey and his father Nathan Johns Covey then joined in making the mortgage to the company who

now sought to compel Powers to accept a title from them under the power of sale contained in the mortgage.

The petition was argued on November 10th, 1886, before Ferguson, J.

S. H. Blake, Q. C., for the vendors. The petitioner's title is perfectly good. The devise being to the husband and wife, they took as tenants by entireties, and on the death of one the other does not take by survivorship but under the original devise: *Theobald* on Wills, 3rd ed., 300. The power of appointment "as they may see fit" gave power to appoint to one child to the exclusion of the others. The husband had the power after the wife's death and conveyed to one child, and the whole property passed. If an appointor has the *intention* and the power to appoint the estate passes, although he may have said he did so under a wrong power. A power in a will to convey lands in fee can be executed by deed upon full consideration, although it does not refer to the will: *South v. South*, 46 Am. R. 591. "At their decease" means at the decease of the survivor. I refer to 2 *Jarman* on Wills, 4th ed. 389; *Wild's Case*, 3 Co. 290; *Sugden* on Powers, 8th ed. 445; *Spring v. Biles*, 1 T. R. 435, note (f); *Woodlock v. Mahoney*, 6 Ir. Ch. R. 236; *Richardson v. Harrison*, 16 Q. B. D. 107.

Robert Armour for the purchaser. The will must be followed. There was first a life estate to Covey and his wife. Then the survivor took. Then the property went to the children, or *some of them*, to be determined by the act of *both* Covey and his wife. The survivor has no power to say who should take, so the children *all* took equally.

Blake, Q. C., in reply referred to *Bradley v. Cartwright*, L. R. 2 C. P. 511, and *Trust and Loan Company v. Fraser*, 18 Gr. 19.

November 18, 1886. FERGUSON, J.—The application is under the Act commonly known as The Vendor and Pur-

chaser Act, R. S. O. ch. 109. The vendors are the petitioners. The matter of difference arises upon the meaning to be attached to the gift contained in the second paragraph of the last will of Eldred Johns Covey. The will bears date the second day of July, 1867. The gift contained in the second paragraph is as follows: "Firstly, I give and bequeath to my nephew Nathan Johns Covey and ——— Covey his wife, twenty-four acres of land being and situate on lot 28 in the 6th concession of Clarke, to their use for the term of their natural life, and at *their decease* to be divided among their children as they may *see fit*."

Nathan Johns Covey and his wife named in the will had several children. He survived his wife, and on the 25th April, 1882, his wife being then dead, by deed conveyed the land to Elroy Johns Covey, who was a son of himself and his wife named in the will, and by this deed he assumed to grant the lands to the said Elroy Johns Covey in fee simple. At the time of the making of this deed there were living several other children of Nathan Johns Covey and his said wife.

On or about the 23rd February, 1883, Elroy Johns Covey and Nathan Johns Covey executed a mortgage on the said lands to the petitioners assuming to grant and mortgage the same in fee simple to secure the re-payment of a sum of money. Default having been made in payment the petitioners in exercise of the power of sale contained in the mortgage, sold the lands to one Arthur Powers, who has objected to the title. Hence this application.

The sole question, as already stated, arises on the meaning of this 2nd paragraph of the will. The petitioners contend that the rule in *Shelley's Case* applies, and that so an estate tail is given, and that the conveyance, by Nathan Johns Covey, operated as was intended as a grant of the estate in fee. They also contend that even if this were not so the conveyance to Elroy Johns Covey was a good appointment under the provisions of the will, (the 2nd paragraph of it.)

The gift to Nathan Johns Covey and his wife was, I think, a gift to them and the survivor of them. If this could from the other words be doubted I think the words "and at *their* decease" shew the meaning and intention. When real or personal property is given to a husband and wife, though with a declaration that they are to be joint tenants, they hold by entireties, and on the death of one the other takes, not *jure accrescendi*, but by virtue of the original limitation: *Theobald* on Wills, 2nd ed. 322, 3rd ed. 300, and cases there cited.

There is here a gift to the husband and wife for their lives, and as I have said the life of the survivor of them. There is then a gift to their children to take effect immediately on the death of the survivor. The word "children" may be a word of limitation, A devise to A, to hold to him and his children forever, or to A and his children forever &c., gives A an estate tail: *Theobald*, 2nd ed. 333, 3rd ed. 310, and cases there referred to. In the index to *Fearne* on Contingent Remainders, 9th ed. it is stated among other things regarding the rule, that the rule in *Shelley's Case* applies where there is a limitation to husband and wife during their joint lives with a limitation over to the heirs of the body of the wife by the husband. The reference as to p. 31 of the book and the case referred to in the text bears out this statement, see also pp. 36 and 37 of the same work.

It is said that if there are any children living at the time of the devise, the term children is *prima facie* not a word of limitation, but that this rule bends to evidence of a contrary intention: *Theobald*, 3rd ed. 311 and cases there referred to.

The petition does not say whether there were children at the date of the making of the will. The date of the will is in 1867. The conveyance to the child was made in 1882 only 15 years afterwards, and it is fair to assume that there were children at the date of the will. There does not appear to be anything on the face of the will, so far as disclosed by the petition, to shew such

contrary intention so as to bend the rule last above mentioned.

In *Bradley v. Cartwright*, L. R. 2 C. P., at p. 522, it is said that where words of distribution, together with words which would carry an estate in fee, are attached to the gift to the issue, the ancestor takes an estate for life only; and the result is the same whether the fee is given by the usual technical words or by implication. The same rule is also maintained by Lord Selborne in the case *Bowen v. Lewis*, 9 App. Cas., at p. 901. In the case *Bowen v. Lewis* the gift stated shortly was to the ancestor for the term of his natural life, and after his decease to his legitimate child or children, with a gift over in case he should die without issue. The Court was divided in opinion. The judgment was, however, that an estate tail was given. The judgment rested upon the intention manifested by the whole will.

In the present case I know nothing of the other parts of the will, as they are not contained in the petition or otherwise shewn, and I must, I think, assume that they are not material to the matter to be considered and decided. Here there are words of distribution, together with words sufficient to convey an estate in fee, attached to the gift; for the gift to the children would be a gift of all the estate that the testator had excepting the part that he had before given, the estate for life; and I do not see that the additional words "to be divided among their children as they (the parents) may see fit," makes in this respect any difference.

In *Wild's Case*, 5 Co. 290, the remainder was given to Rowland Wild and his wife and after their decease to their children. Rowland Wild and his wife then had a son and a daughter. The Court said the question for determination consisted only of the consideration what estate Rowland Wild and his wife had, viz., if they had an estate tail, or an estate for life with remainder to their children for life, and it was decided that Rowland Wild and his wife had but an estate for life and not an estate tail.

The present case seems to me to be much like that very well known case, and although at the close of the argument I had an impression that the [husband and wife in the present case took by the will an estate tail, I am now after having consulted many authorities, of the opinion that they did not take an estate tail but only an estate for life.

Then, as to the conveyance made by the husband after the death of the wife being as contended for a good appointment under the terms of the will. The words of the will in this respect are: "And at their decease to be divided among their children as they may see fit."

The authorities shewing when or under what circumstances an exclusive appointment is authorized, are apparently well collected down to the year 1861, in *Sugden on Powers*, 8th ed. 444, 445 *et seq.* I have examined a number of these: counsel referred particularly to *Spring v. Biles*, 1 T. R. 435, note (f.); and *Woodlock v. Mahony*, 6 Ir. Ch. R. 236.

In *Kemp v. Kemp*, 5 Ves. 849, the words were: "What remains * * I give to my cousin Martha Kemp for her life, and then to be disposed of amongst her children as she shall think proper." The Master of the Rolls refers to a very large number of authorities and amongst them to *Spring v. Biles*, *supra*, and seems to have reviewed them with great care. He says that his inclination is strong to support the execution of the power, in the case before him if he could consistently with the rules he found established. He said at p. 860, "This is a trust beyond all question. What is the effect of the words 'amongst her children?' Is it necessary to say 'all and every?'" and he then refers to the cases quoted in *Swift v. Gregson*, 1 T. R. 432, which he says plainly shew that if it were not for the word "such," the word "amongst" would require a distribution so that everyone must take some share.

In *Woodlock v. Mahony*, the Lord Chancellor also referred to *Spring v. Biles*, as well as the case of *Doe*

Wilmott v. Atchin, 2 B. & A. 122. and held that an appointment excluding any of the children could not be made under the power in that case.

In the present case there are the bald words "and at their decease to be divided among their children as they may see fit." The words "as they may see fit" are no stronger than the words above "as she shall think proper." I think they are in meaning the very same.

This matter is one on which there may be differences of opinion, but the conclusion at which I have arrived is that this appointment in favour of one only of six or eight children is not a valid and good appointment, and I am of the opinion that it would not be good even if it had been made by both husband and wife. No other appointment was made under the will.

The further question as to the conveyance having been made by the husband only after the death of the wife, and not by both husband and wife, may present much difficulty; but being of the opinion that I have stated in respect of the other questions, I think I need not consider or decide upon it.

What the petition asks is that it may be declared what interest the petitioners took in the lands under and by virtue of the will and the several conveyances referred to in the petition.

The mortgage to the petitioners was executed by Nathan Johns Covey and his son Elroy Johns Covey. At that time Nathan Johns Covey seems to have been entitled to a life estate in the lands. He died in October, 1886, leaving him surviving two sons and six daughters, issue of himself and his said wife, who were devisees under the will of Eldred Johns Covey, so says the petition. Upon his death his son Elroy Johns Covey became, I think, entitled in possession to one-eighth share of the property in fee, and I am of the opinion that these two interests and no more passed by the mortgage to the mortgagees, the petitioners.

This is perhaps much more than I am properly called upon to say upon a petition under the Act.

I am of the opinion that the respondent should succeed upon this petition, and that the title offered him in pursuance of his purchase is not one that he can be compelled to accept.

It was agreed that there should be no costs of petition. No costs.

Judgment accordingly.

G. A. B.

[CHANCERY DIVISION.]

WYLD ET AL V. CLARKSON.

Guarantee—Creditors right to rank on two estates in hands of assignees—Valuing security—48 Vic. ch. 26 (O.), sub-sec. 4 (b.)

The plaintiffs supplied B. with goods on the guarantee of M. M. made an assignment for the benefit of creditors under 48 Vic. ch. 26 (O.) B. assigned in like manner a few days after. The plaintiffs proved their claim for the full amount on M.'s estate, and stated that they held as security their claim against B.'s estate, but did not value it. B. effected a composition with her creditors, and gave composition notes therefor. The defendant M.'s assignee refused to pay a dividend to plaintiffs until they had valued their security on B.'s estate. Upon a special case being stated for the opinion of the Court, it was

Held, that by B.'s assignment his estate was placed *in custodia legis*, protected from judgments and executions, and made available for the creditors who were thus potentially seized of their proper proportion of the assets. The original personal claim was thus transmuted into a claim *in rem*, and so could fairly be regarded as in the nature of a security, which the plaintiffs were bound to value under sub-sec. 4 (b.)

THIS was a special case stated for the opinion of the Court between Messrs. Wyld, Brock & Co., as plaintiffs, and Edward R. C. Clarkson, assignee of the estate of one John S. Munro defendant, the material portions of which are summarized in the judgment.

George Kerr, Jr. for the plaintiffs. The security, if any, held by the plaintiffs is a mere covenant of a third party, and is not such a security as must be valued under either sub-sections 4 or 5 of section 18, 48 Vic. c. 26 (O). The plaintiffs are entitled to look to Munro's estate for the whole debt, and can therefore prove for the whole amount. *Eastman v. The Bank of Montreal*, 10 O. R. 79. [BOYD, C. —But that case was decided before 48 Vic. c. 26 (O.) was passed.] It is true that now the plaintiffs have certain composition notes or the proceeds thereof from the Blain estate, but at the time they proved their claim on the Munro estate they had nothing but a mere liability of Mrs. Blain to pay. Sub-secs 4 and 5 of the statute make a distinction between a *claim* and a *security*. The plaintiffs held a mere claim and there is nothing in the statute to compel them to value a claim as distinguished from a security.

Foy, Q. C., for the defendant. The plaintiffs treated Munro as primarily liable, but by proving for the full amount on the Blain estate they abandoned their security from Munro. The Ontario Statute for 1885 goes much further in compelling a valuation of securities than the old Insolvency Act of 1875, 38 Vic. c. 16 sec. 84, (D.); but even under that statute the creditor except for the purpose of ranking was considered to hold security within the meaning of the Act, if the claim was mature: *Clarke's Insolvency* 251.

November 30, 1886. BOYD, C.—The plaintiffs supplied goods to Mrs. Blain to the extent of \$1,775, payment of which on her default was guaranteed by the covenant of Munro. Both were personally responsible for the debt to the plaintiffs: Mrs. Blain in contract and the surety on his covenant. Beyond this, no security was held by the creditors. On March 20, 1886, Munro assigned for the benefit of his creditors under 48 Vic. cap. 26 (O.), and on the 30th March, Mrs. Blain assigned in like manner. On 6th April the plaintiff filed his claim against Munro's estate stating

that he held as security his claim against Mrs. Blain's estate, and that he was unable to state what would be realized therefrom. On the 8th April Mrs. Blain effected a composition with her creditors at fifty cents in the dollar for which promissory notes were given to the plaintiffs. A special case has been prepared on behalf of the Munro estate upon which the following questions are submitted to the Court ?

1. Do the plaintiffs hold security within the meaning of the statute and are they bound to put a specified value thereon ?

2. Were the plaintiffs on 22nd of May, 1886, entitled to have received from the defendant a dividend of twenty-five cents on the dollar on \$1,775 ?

3. If not for what amount are they entitled to rank ?

4. By whom should the costs be paid ?

The solution of the first question will practically decide all the rest. The Act in the 18th section deals with the valuation of securities held by creditors proving claims. Sub-sec. 4 provides for the cases of (a) a creditor who holds any security on the estate of the debtor, or (b) on the estate of a third party for whom the debtor is secondarily liable. Sub-sec. 5 provides for a third case (c) of a creditor who holds a claim based upon negotiable instruments on which the debtor is secondarily liable, and which is not mature or exigible..

The first two cases deal with *securities* properly so called, that is, visible and tangible instruments which affect the property of the debtor or third party. They are spoken of as *held* by the creditor; can be *assigned* to and *realized* upon by the trustee.

The last case provides for the imputation of the character of a security to an instrument which does not affect the property, and in this case the creditor is "*considered to hold security* within the meaning of the statute." But what he does hold is simply "the liability of the party primarily liable on the negotiable instrument."

But for the assignment made by Mrs. Blain, I should agree with the argument of the plaintiffs that here there was no such security possessed by the creditor as the Act contemplates. At first there was but the personal liability of Mrs. Blain, (the principal debtor) and that does not appear to me to come within the meaning of the Act. But a very important and significant change occurred as a consequence of her assignment—the effect of which was to cast upon the plaintiffs the security of her estate by operation of law. By the assignment all her estate (sec. 4) vests in the assignee, who is also called in the Act (sec. 7) a *trustee*, *i. e.*, for the general benefit of all creditors. The whole estate is thus *in custodia legis*, protected from judgments and executions, (sec. 9) and available for the creditors in due course of law. The plaintiffs were thereupon and thereafter entitled to rank on the Blain estate, and were potentially seized of their proper proportion of the assets.

The original personal claim of the plaintiffs is thus transmuted into a claim *in rem.*, one which practically attaches upon the estate itself, and may fairly be regarded as in the nature of a security. The assignee holds the estate *pro tanto*, as security for the payment of these creditors, and I think the circumstances of this case bring it within the equity, if not within the strict letter of the Act. I would call this present right to rank and share a *security* held by the assignee for the plaintiff (as creditor) on the estate of a third person, (Mrs. Blain) for whom the debtor (Munro) is only secondarily liable, and which fills with sufficient accuracy the requirements of the second case mentioned in sub-sec. 4.

If the plaintiffs were unable to value their security on the 6th of April, they could have done so two days afterwards when they consented to and accepted the composition, and they should then have applied to amend and re-value their claim. This they should now do, and the assignee will act as advised in accepting or rejecting the security.

To the first question I answer, that the plaintiffs hold security and are bound to value it.

To the second, I say that the plaintiffs were not entitled to a dividend on their full claim on the 22nd May, 1886.

To the third, I answer that it depends on the action of the assignee.

To the last, I think that no costs should be given; as the point is new and somewhat difficult of solution, and was not argued before me in the manner in which I have decided.

G. A. B.

[CHANCERY DIVISION.]

GORDON ET AL. V. GORDON ET AL.

Mortgage by executors—Mortgage by specific devisees—Priority—Amount found due by Master not appealed against—Variation.

The judgment of Proudfoot, J., reported ante 11 O.R. 611 upheld in part. By the Court—There should be no alteration in the amount found due by the Master when such amount has not been appealed against.

THIS was an appeal from the judgment of Proudfoot, J., reported ante 11 O. R. 611.

The appeal was argued before the Divisional Court on September 10th, 1886, before Boyd, C., and Ferguson, J.

Moss, Q. C., and *Williams*, for the executors of Patrick Turley who appealed. The learned Judge was wrong in dismissing the appeal on the priority question as well as in reducing the amount of the Turley claim against the Gordon estate, for there was no appeal against the amount as found by the Master. We are entitled to priority for as much of our money as was used to pay off the mortgage on the Foundry property, viz., \$500, and we are entitled on the principal of salvage to \$108.07 taxes paid. The balance of our claim is a charge on the general estate. Power to sell gives power to mortgage. We may not be

able to prove a claim as against the creditors, but we can do so as against the parties interested in the estate: *Haynes v. Forshaw*, 11 Ha. 93; *Ewart v. Steven*, 16 Gr. 193.

E. D. Armour, contra. The mortgagees are purchasers for value without notice from the specific devisees, and were not bound to enquire whether the defendants were all paid. They, therefore, take a good title free from any claim of the appellants: *Reed v. Miller*, 24 U. C. R. 610. Until judgment passed and execution issued against the executor, the heir can make a good title: *Kinderley v. Jervis*, 22 Beav. 1. There was no execution here until the money was advanced, so the mortgagees have a good title. There was no notice of any lien. In *The Trust and Loan Co. v. Gallagher*, 8 P. R. 97, the parties had to protect themselves by paying off a prior mortgage, and they held as assignees thereof. In *Imperial Loan and Investment Co. v. O'Sullivan*, 8 P. R. 162, the payment was by a mere volunteer. Here Turley was a volunteer. The taxes were paid generally for the benefit of the estate. Turley was not responsible for the application of the money, and his estate therefore cannot be placed in priority to the mortgagees of the specific devisees. We have a specific charge on the Foundry property, and Turley's claim cannot be put before us, because the estate cannot be marshalled so as to let us in on any other fund to be paid, Turley having exhausted the fund on which he had a specific lien. As the mortgage made by the executor was invalid, *Stroughill v. Anstley*, 1 D. M. & G. 635, only six per cent. can be charged against the infant. As to subrogation, I refer to *Edinburgh Life Assurance Co. v. Allen*, 18 Gr. 425; *Devaynes v. Robinson*, 24 Beav. 86; *Page v. Cooper*, 16 Beav. 396; *Lewin on Trusts*, 6th 377.

Moss, Q. C., in reply. Even if the mortgage does not bind the whole estate, we should get priority on the Foundry property, to the extent our money went into the estate: *McIntyre v. Shaw*, 12 Gr. 295; *McQuestten v. Campbell*, 8 Gr. 242.

November 17, 1886. BOYD, C.—It seems impossible to give the Turley executors priority for any sum paid by them in discharge of the mortgage on the foundry property as against mortgagees of that property, deriving title from the specific devisees. The effect of the payment was to discharge the foundry property of that incumbrance, and before any lien attached by the judgment and execution against the Gordon executor, the title of these mortgagees arose. They can validly claim as purchasers for value without notice, even if there were no other answer to the appellant's claim: *Ewart v. Steven*, (in Appeal) 18 Gr. 39, 40.

Regarded as salvage, the appellant's have no right to charge their advances to the executor against the realty, because they were strangers to the estate and had no interest therein to preserve: *Watson v. Dowser*, 28 Gr. 478, and *O'Loughlin v. Dwyer*, 13 L. R. Ir. 75.

For these reasons the appeal of the Turley executors was rightly dismissed by my brother Proudfoot. But I do not think he should have gone further and reduced the amount of their claim as proved before the Master and not appealed from. That appears to me to be an irregular proceeding and a manner of giving redress not warranted by the practice: *Burdett v. Hay*, Jur. 1863, p. 1260; *Goose v. Bedford*, 21 W. R. 449. To this extent his order should be modified, and the Master's report will remain in this respect as if not appealed from. This is not a case for awarding any costs, except to the infant, to be paid by the appellants.

FERGUSON, J.—This is an appeal from an order made by Mr. Justice Proudfoot upon an appeal from the report of the Master at Belleville.

The appeal from the report seems to have been upon two grounds: 1. That the Master should have found that the balance due on the mortgage held by the executors of the last will of the late Patrick Turley, after deducting the proceeds of the sale of the lands embraced in the

mortgage, should rank upon the proceeds of the "Foundry property" mentioned in the proceedings; 2. That the proceeds of this mortgage having been, to a large extent, applied in payment of the mortgage that was due upon the "Foundry property," which was a debt owing by the estate of the late Harriet L. Gordon—this should be repaid before the encumbrances upon the shares of the persons to whom the property was specifically devised.

In respect of this last, the learned Judge says: "The Master was right, however, in not giving this claim priority over the encumbrances created by the specific devisees. It does not appear that these encumbrancers had any notice of the source from whence the money that discharged the "Foundry mortgage" came. There was nothing in the registry to show that Turley could have any claim upon other property than that mortgaged to him."

The appellants in the present appeal contend that this conclusion of the learned Judge is erroneous, and that the priority claimed over the encumbrancers from the specific devisees should be declared.

I think the opinion of the learned Judge on this part of the case is quite correct. The language of the Vice-Chancellor, in *Haynes v. Forshaw*, 11 Ha. at pp. 104 and 105, seems to me of direct application in support of this opinion, and I also agree in thinking that even if there were no other answer to the contention of the appellants in regard to this part of the appeal, the incumbrancers from the specific devisees could successfully claim as *bonâ fide* purchasers for value without notice. See also the concluding remarks of Mr. Justice Gwynne, in *Ewart v. Steven*, 18 Gr., at p. 40.

The appellants contended that the amount paid for taxes should be allowed as salvage, and that there is a lien and should be priority also as to this. In the case of *O'Loughlin v. Dwyer*, 13 Ir. L. R. Ch. at p. 80, the learned Vice-Chancellor says: "It is a fundamental rule in claims for liens for salvage payments, that a mere

third person who voluntarily makes a payment by which an estate or interest is preserved for the benefit of the persons interested therein, cannot claim a lien for the money so paid." This, I think, is an answer to the contention so far as the matters of the lien and priority are concerned, for the appellants had not, so far as appears any interest in this realty to be preserved.

The notice of appeal from the report of the Master does not contain any ground of appeal in respect of the validity or invalidity of the mortgage, or any excess in the amount found by the Master in favour of the present appellants. We were not told that these questions were by consent to be argued and decided upon by the learned Judge, and I agree in the view stated by the Chancellor as to the practice that should be adopted under such circumstances.

I also concur in the conclusion expressed by the Chancellor, and the disposition made by him as to the costs.

G. A. B

[CHANCERY DIVISION.]

HALL v. FARQUHARSON.

Tax sale—Improper assessment—Payment of taxes—Non-resident lands—Admissibility of evidence to correct non-resident roll.

H. being the owner of four islands called them O. F. B. & C. islands, and improved O. by building a house, &c., on it. O. had previously been sometime known as Island D., and was described by that name in the patent. H. ascertained what taxes he owed, and paid all that were demanded. The assessor from general information assessed the islands, and so assessed Island D. on the non-resident roll for the years in question. The taxes were not paid on Island D. as assessed on the non-resident roll, and it was consequently sold at a tax sale.

In an action by H. to set aside the sale, in which it was shewn that F. Island was assessed by mistake as the improved island on the resident roll and O. Island on the non-resident roll as Island D. It was

Held, [affirming the judgment of FERGUSON, J.,] that as to errors in non-resident land assessments, under the provisions of the Assessment Act, R. S. O. ch. 180, the County Treasurer is not bound by the roll, but can receive evidence and correct errors therein, and that in this case he could have done so as to the "incorrect description" and the "erroneous charge" based thereon, and that the taxes were paid and "satisfactory proof" being made on these points, it would have been his duty to stay the sale, and if so it was the duty of the Court to interfere and undo the wrong. The Assessment Act recognizes the possibility of evidence being given to evade or neutralize entries upon the roll and official books. And the sale was set aside.

THIS was an appeal from the judgment of Ferguson, J., delivered in an action brought by John Hall against Murray Farquharson to set aside a tax sale.

The action was tried at the Sittings held in Toronto, on May 3rd, 1886.

McMichael, Q. C., and *A. Hoskin*, Q. C., for the plaintiff,
Pepler, for the defendant.

The evidence shewed that the plaintiff was the owner of four islands in lake Rosseau, in the Muskoka District, on one of which, Oak Island, he had built a house and made other improvements for a summer residence. The names he called his islands, were Oak Island, Cedar Island, Flora Island, and Beacon Island. Oak Island had previously belonged to a Mr. Pope, and was known to some people as

Pope Island, while its proper title in the Crown Land Department and in the patent and deed to plaintiff, was the island "D."

After the plaintiff became the owner of the islands, he placed himself in communication with the assessor and tax collector of the township, and the county treasurer, for the purpose of ascertaining what his taxes were, and when he did so he paid all that was demanded from him, and thought he had paid everything that was due.

The assessor was examined and showed that the assessment of all the islands in the lake was done in a very general way upon just such information as he could pick up; that he had assessed such as he understood to be the plaintiff's islands to him for the years in question, one of which he knew was improved by the house, &c., and which he had assessed at an increased value, because of such improvements: that he assessed the one with the house on under the name of "Flora," and supposed that was its true name: that one year he had marked one of them with the letter "H." opposite it on his roll, and he swore that that meant the one on which the house was although by mistake he had put the letter "H." opposite the wrong island, (Beacon island) but that he had always assessed one of them as increased in value, and intended it to be the one with the house. That in the later years he had actually seen the improved island and assessed it still as Flora Island, but that in the earlier years he had assessed it as the improved island, he having been informed that Flora Island had the improvements; and that the plaintiff had paid all the taxes assessed to him in the different years, and those on the island assessed under the name of Flora.

He also testified that some acquaintance had told him that an Island "D." was owned by Mr. Pope, and he had placed it on the non-resident roll as Island "D." each of the four years on which the taxes were not paid, and which had been sold for taxes.

The sale was had for four years' arrears.

For each of these years "D." was returned on the non-resident roll.

For the first year Islands Flora and Cedar were also on the non-resident roll, and the plaintiff was not assessed for any, but he paid the taxes on these two in the subsequent years through the county treasurer. The second year he was assessed for these two and Beacon. The third year for Flora and Cedar only, and for the last year for Flora, Cedar, and Beacon; and also for Oak Island, as "Oak Island." He had consequently paid taxes on all the four islands the last year.

None of the other islands were improved.

May 3rd, 1886. FERGUSON, J.—The man who knows most about the facts is Nathaniel Orchard, who was assessor and collector during those four years, 1879, 1880, 1881, and 1882, the years for which it was said the taxes upon this land were in arrear and unpaid. He shows, I think, very clearly, and other evidence shows the same thing, that this island can be designated from all the other islands in the group, by the fact that there were improvements upon it, and there were no improvements upon the others or any of them.

He says that during the whole four years he intended to assess this island at an advanced sum on account of the improvements. We find that in each year there is an island assessed at an advanced sum. We find that in one year another name is given to the island; the same sums are retained, but another name is set opposite to the advanced sum. The witness says that was a mistake of his. Counsel contends that the island of Flora, which the witness thought was the island on which the improvements were, was in one of these years reduced to five dollars. I think the proper way to look at it is, that the one name is used instead of the other. "Flora" put where "Beacon" ought to be, and "Beacon" put where "Flora" ought to be; and this is what the witness says. So that looking at the case on the evidence of this witness

—in some respects supported by the evidence of other witnesses, and in no respect contradicted—I find that during the four years this island with the improvements, was in point of fact assessed, and that the taxes as assessed were all paid.

I do not think it necessary to make any remarks in regard to the manner in which the lands were taken off the non-resident list and put upon the other. At the request of an agent or friend of the owner, it was done, as the witness says: in fact it was done, and the taxes that were, (there is no doubt on the evidence,) levied on this lot, were paid. How did the other alleged taxes arise? The witness says, “I received information that Pope was the owner of Island D, and I so assessed it on the non-resident roll.” That is the assessment on which Mr. Pepler relies for the foundation of his title. Nothing can be clearer on the evidence than that foundation had no existence. Pope was not the owner of the island. The assessor received false information, and he assessed it as if it was another island; that is, an island not owned by the plaintiff. Pope had been the owner of the island, or at all events he was the patentee, and years before that time he had conveyed it away; and upon the information that he was the owner the assessment relied upon by the defendant began. It was wholly without foundation. But for the erroneous statement, that assessment would never have taken place at all; and I can look upon it in no other way than that the whole of this assessment relied upon by the defendant for the whole four years was without foundation. It is plain to me upon the evidence that the taxes upon these islands were levied and paid, and this was something aside from that, having simply a false statement as its foundation.

It is a case where all taxes were paid. There were no taxes in arrear at the time of the sale, and on that ground alone I think the sale must be set aside. I think it would be monstrous to hold that this man who was so particular to pay his taxes, and did pay them, should lose his land.

As to the costs, the parties have come to Court and done battle against one another on every available ground, and I do not see under the circumstances any sufficient reason for departing from the rule that the costs should follow the event. The sale and conveyance are set aside with costs to the plaintiff.

From this judgment the defendant appealed to the Divisional Court and the appeal was argued on September 4th, 1886, before Boyd, C., and Proudfoot, J.

McCarthy, Q. C., and *Pepler*, for the appeal. The evidence shews that the plaintiff's four lots were islands D, Flora, Cedar, and Beacon. D was assessed at a value of \$4, or \$1 an acre for the years 1879, 1880, 1881, and 1882. Flora with Cedar was assessed in 1879 on the non-resident roll at \$25, and in 1880, with Beacon on the resident roll. Two lots only, Flora and Cedar, were assessed in 1881, and four including Oak (which is alleged to be identical with D) in 1882. Lot D was sold in 1883 for the taxes of 1879, 1880, 1881, and 1882. The assessor swore that he thought he was assessing the island with the improvements when he assessed Flora. If Flora was improperly assessed the plaintiff should have appealed. The plaintiff cannot complain as he must have known each year he was not assessed for all of his islands. Extrinsic evidence cannot be admitted to contradict the assessment roll. The assessment roll and the sale must stand: R. S. O. c. 180, s. 155, Three years' taxes were absolutely due and unpaid on Island D, and plaintiff was not assessed for those years for a fourth island, and even if the taxes for 1882 were paid on Island D as Oak Island, it was only a sale for too much. If the taxes were divisible, the sale for an excessive amount was good. The cases contra are where the whole is an assessment of several parts thus preventing tender of the right amount as in *Hill v. Macaulay*, 6 O. R. 251. *Beckett v Johnston*, 32 C. P. 323; *Ley v. Wright*, 27 C. P. 522. As to the last year, if Oak Island and Island D were identical, one being assessed on the non-resident roll and the other

on the resident, the resident assessment is void, it being properly on the non-resident roll as unoccupied and no statutory notice. We refer to R. S. O. c. 180, secs. 137, 150, and 155; 32 Vic. c. 36, s. 138 (O); *Cotter v. Sutherland*, 18 C. P. 390; *Connor v. Douglas*, 15 Gr. 456; *Nelles v. White*, 29 Gr. 338, 345-6; *Claxton v. Shibley*, 10 O. R. 295; *Fleming v. McNabb*, 8 A. R. 667, and *McKay v. Chrysler*, 3 S. C. R. 436. It would be dangerous to open the door to parol evidence varying the assessment after the time for appeal has passed. In this case it seems clear the assessor did not assess any *certain* island as the improved island, as the second year Beacon is the one with the largest valuation, and it is omitted both in 1879, and in 1881 and 1882. Oak (the one which really had the improvements) is assessed. Even if the personal inspection of the improved island was an assessment of it although by a wrong name, yet this could not be said of the earlier years, the assessor admitting he did not see the island till the later year, and consequently his error (if any) was in assuming that Flora Island contained the improvements, and as there was a Flora Island and he did not assess all four islands to plaintiff, the sale was certainly good for the earlier years in any case.

McMichael, Q. C., contra. The evidence shews Island Flora was a little island covering the mouth of the bay on Island D, and is not more than one-tenth of an acre in size. The assessor recollects assessing the island, with the improvements, and all those taxes are paid. Island D is one and two-tenths acres in size. The same island was thus assessed three times in 1882 as Islands D., Oak and Flora. The plaintiff paid the taxes on it as Oak and Flora, and still it was sold as Island D. I refer to R. S. O. ch. 180 s. s. 130 and 131. The island was returned as Oak Island on the resident roll for 1882.

McCarthy, Q. C., in reply. The payment, if any, was made to the local officer after the rolls were returned to the county treasurer. See also R. S. O. ch. 180, sec. 116.

September 22, 1886. BOYD, C.—This is a case in which, if it is possible, the tax sale should be set aside, both because the owner has actually paid all the taxes attributable to the land in question, and because by the payment of \$1, the tax-purchaser claims to hold an island which, with its improvements, is worth at least \$2,000. The broad fact is indisputable that payment has been fully made in due course of all the taxes intended to be assessed on this island, and the argument in the appeal reduced the question to this narrow limit—that extrinsic evidence could not be given to contradict the assessment roll, and other municipal books and papers. I do not find by a reading of the Act that the assessment roll, as it affects non-resident lands (not assessed to the owner), is of such a conclusive character as in the case of other lands which come before the Court of Revision. Compare section 57 with section 67 of R. S. O. cap. 180. The proceedings prescribed by the Act for non-resident land assessment, when the names of the owners are not given are found in section 27, which regulates the form of the roll; section 67, which regulates appeals; section 86, as to statute labour; section 90, as to the transmission of the roll relating to such taxes by the clerk of the local municipality to the treasurer of the county, whose duty it is to collect under section 116, subsection 2, and to keep a book of arrears under section 120; section 108, which requires the county treasurer to furnish a list of the lands three years in arrears for taxes to the local clerk who, by section 109, gives a copy of it to the assessor who is to see if the lots therein are occupied or *incorrectly described*, and who is to notify the owners if known whether resident or not upon the assessment notice that their land is liable to be sold; by section 117, the municipality may remit taxes on non-resident land; by section 118, the treasurer may receive evidence of payment or erroneous charge and thereupon remit proportionately; and he may also, under section 122, correct any clerical error discovered by himself or certified to him by the local clerk.

These provisions appear to me to have peculiar significance with regard to the functions of the treasurer as to errors in non-resident land assessments. He is not bound by the roll, but can go behind it and receive parol or other evidence which, if satisfactory to him, will result in the correction of the roll, or the rectification of the error.

I take it, that the treasurer, before this sale had power to stay the injustice about to be perpetrated; had his attention been called to the facts, he was empowered to take evidence of the "*incorrect description*" by which the improved island was entered upon the roll under the name of the small unimproved one, and of the "*erroneous charge*" based thereon, and also to take evidence that taxes on the improved island were annually paid by the owner though not properly credited, by reason of the confusion of names originating with the assessor.

"Satisfactory proof" being made on these points, it would have been the duty of the treasurer to stay the sale at all hazards, and if so, I deem it to be now the duty of the Court to interfere after the sale, and undo so great an iniquity.

The Court is not embarrassed by the defence set up which merely relies upon the the tax deed, and does not plead the registry laws or the defence of purchase for value without notice—if that were possible, on a consideration of five shillings. In brief, the Act recognizes the possibility of evidence being given to evade or neutralize entries upon the roll and official books—all that needs to be carefully guarded is, as to the character and weight of that evidence which, in the present case, is abundantly satisfactory both as to the manner of the error, and the actuality of the payment of all that could be exacted.

Taking this view I do not find it necessary to consider the effect of the land having been sold for an excessive amount on account of the taxes for 1882, having been in any aspect of the case well paid. On this point I do not agree with Mr. McCarthy's argument, as I think the year's

rate was validly assessed and paid on Oak Island, which was identical with Island D. Section 3 of the Act has to be read with section 40; and there was besides a ratification on all hands of what was due on the assessment. Nor is it necessary to consider in view of *Deverill v. Coe*, 11 O. R. 222, whether this sale could be supported as one fairly conducted under section 155.

The judgment should be affirmed with costs. See *Dougherty v. Dickey*, 4 Watts & Sergt. 146; *Laird v. Hester*, 25 Penn. St. 452; *Kinsworthy v. Mitchell*, 21 Ark. 145.

PROUDFOOT, J.—The judgment just delivered by the Chancellor is the judgment of the Court.

G. A. B.

[CHANCERY DIVISION.]

FURLONG V. REID.

Chattel mortgage—Proof of consideration—Onus of proof—New trial.

In an interpleader action to try the right to the proceeds of the goods sold by the sheriff one of the plaintiffs was a mortgagee of the goods. He put in and proved the chattel mortgage, but gave no evidence of a debt due or of pressure used. On this the Judge charged the jury that there was no evidence of a debt or of pressure, and he refused to allow the consideration to be proved after the plaintiffs closed their case. The jury brought in a verdict for the defendant.

On a motion to enter a judgment for plaintiffs or for a new trial, it was held that there must be a new trial.

Per BOYD, C.—The mortgagee plaintiff proved enough to cast the burthen of attack on the defendant. Proof of the mortgage duly executed shewed that the property and title to the goods passed from the judgment debtor to the mortgagee before the seizure. The execution creditor should displace this ownership by showing want of consideration or other reason. Suspicion would not justify the conclusion that the mortgage was a voluntary instrument contrary to its purport. There was no evidence that the wife knew of the husband's insolvency, and concurred with him in an attempt to gain a preference at the expense of the other creditors.

Per PROUDFOOT, J.—The mortgage might be valid if given for a present advance of money for carrying on the business or other proper purpose, and insolvency would not be a circumstance shifting the onus of proof, and the production of the mortgage would be *prima facie* evidence; as the plaintiff, the mortgagee, appeared to have been misled, and was refused leave to supplement his evidence; a new trial should be granted to him.

THIS was a motion for a new trial in an interpleader action brought by Edward Furlong as chattel mortgagee from, and Cornelius Murphy as assignee for the benefit of creditors of Frederick Murphy, the judgment debtor, against John Younge Reid, the execution creditor, to try the right to the proceeds of certain goods and chattels seized and sold by the sheriff under an execution.

The action was tried at Hamilton, at the Spring Assizes of 1886, before O'Connor, J.

E. Martin, Q.C., for plaintiff Furlong.

F. Fitzgerald, for plaintiff Murphy.

Osler, Q.C., and *Parkes*, for the defendant.

It appeared that the chattel mortgage was made to Furlong as trustee for the wife of the mortgagor on April, 30th, 1885; that the assignment to Cornelius Murphy was made on May, 4th, 1885; and the sheriff seized the goods on the following day, May 5th, and there was evidence to shew that Frederick Murphy was in insolvent circumstances.

Cornelius Murphy was examined, and his evidence shewed that he was a brother of Frederick, and had been in his employment, and that all the money he had collected under the assignment had been used by him, not in paying creditors but in carrying on the business that Frederick Murphy had been engaged in.

The mortgage was put in on behalf of Furlong and its execution proved.

On the learned Judge commencing his charge he told the jury that there was no evidence of any debt.

Mr. Martin then contended that the debt was not attacked and said that if it was, he asked leave to call evidence to prove it. This was refused.

The Judge then told the jury that in his opinion there was no evidence of a debt due to Mrs. Murphy or of pressure by her to get the chattel mortgage; and that if they believed on the evidence that the assignment was made for the purpose of defeating or delaying creditors that it was bad.

The jury brought in a verdict for the defendant. Against this verdict both plaintiffs moved and asked for judgment in their favour or for a new trial.

The motion was argued before the Divisional Court on September 8th, 1886, before Boyd, C., and Proudfoot, J.

Furlong in person. There was no evidence to cast the onus on me to prove the consideration in the chattel mortgage. The mortgage, goods, affidavits, execution, and filing were all proved. The mortgage on its face shews the parties and consideration. [BOYD, C.—Was there any proof of anything due from the husband to the wife at the

time the mortgage was made?] No; it was not necessary. "As the presumption is always in favour of fairness, the statement of the payment of the consideration in an instrument is *prima facie* evidence of the fact:" *Bump* on Fraudulent Conveyances, 3rd ed. 594. The Judge who tried the action assumed that it was a voluntary conveyance and for an antecedent debt. [PROUDFOOT. J.—He does not say that, he says there was no evidence of a debt and no pressure.] "The mere fact of a deed being voluntary is not enough to render it void as against creditors": *Kerr* on Fraud and Mistake, 2nd ed. 177. The intent "to defeat, delay, &c.," should be proved and shewn to be present to the minds of both parties. The only evidence is that of the assignee which should not affect me. There is no presumption that either the wife or trustee knew it. The mortgage shews a present advance. A party in possession can go behind the execution and attack the judgment: *Davis v. Levey*, 11 C. P. per Draper, C. J., at p. 298. The filed mortgage put me in possession. A party who alleges fraud must clearly prove the fraud he alleges: *Kerr*, 2nd ed. ch. 10. The Court will not act on suspicion: *Burns v. MacKay*, 10 O. R. 167.

F. Fitzgerald, for the assignee. The evidence shews no fraudulent intent. An assignor can execute an assignment with the object of delaying creditors without its being fraudulent, "The mere intent on the part of the debtor to prevent a sacrifice of his property does not necessarily and of itself render an assignment void:" *Bump*, 3rd ed. 359. "Where the property of the debtor is insufficient to pay his debts, the desire to protect it from sacrifice and have it realize as much as possible is not inconsistent with fair dealing and honesty, and instead of violating the policy of the law or the rights of creditors, is in harmony with both, and exempt from the charge of fraud:" *Bump*, 371. The Judge should have told the jury that there should be a joint intent between assignor and assignee to defraud: *McRoberts v. Steinoff*, 11 O. R. 369. "In determining whether an assignment is or is not

fraudulent against creditors, the question is said to be, not whether fraud may be committed by the assignee, but whether the provisions of the instrument are such that, when carried out according to their apparent and reasonable intent, they will be fraudulent in their operation: *Burrell* on Assignments, 3rd ed. 487. I also refer to *Bump* 21, 22, 352 to 361 and 365. Circumstances of mere suspicion will not warrant the conclusion of fraud, *Kerr*, 2nd ed. p. 450.

Parkes, for the defendant. The defendant need not prove his execution: *Paterson v. Langley*, 11 C. P. 411. The chattel mortgage is not by itself sufficient proof of consideration: *Bump*, 1st ed. 156, 157. The evidence shewed hopeless insolvency: *Allen v. McTavish*, 28 Gr. 539, S. C. 8 A. R. 440. The *onus* of proof of consideration lies on the party seeking to maintain the deed. [BOYD, C.—The statement in this deed does not prove the fact unless the deed is put in by the other side which gives it weight.] An execution creditor has a *prima facie* case. I refer to *Taylor v. Whittemore*, 10 U. C. R. 440; *Badenach v. Slater*, 8 A. R. 411; *Riches v. Evans*, 9 C. & P. 640; *Waite* on Fraudulent Conveyance, 1884 ed. 282.

September 22, 1886. BOYD, C.—The chattel mortgage for \$4,380 was made by a debtor to a trustee for his wife on the 30th April, 1885, and was duly executed and registered. The debtor then assigned all his assets for the benefit of creditors on the 4th May, and on the 5th May, the sheriff seized the goods covered by the mortgage, in the possession of the debtor or his assignee. The trustee for the wife claims the goods and is the plaintiff in this issue. At the trial the plaintiff rested his case upon the proof of the execution of the chattel mortgage, without proving the debt or consideration. The Judge directed the jury that the instrument must be regarded as voluntary but intimated that even if there was a debt there was no evidence of pressure.

The plaintiff now moves against the verdict based on this charge.

It would be an unfortunate thing if the rights of the parties were to go off upon this narrow point without a thorough sifting of the facts, but at present it appears to me that the plaintiff proved enough to cast the burden of attack upon the defendant. The sheriff's seizure of the goods out of the possession of the mortgagee was *primâ facie* justified, so that at the trial it rested upon the plaintiff to displace this. This, however, was done by the proof of the mortgage duly executed, which shews that the property and title in the goods passed from the judgment debtor to the mortgagee before the seizure.

It would next seem to lie on the execution creditor to displace the ownership resting on the mortgage by shewing that it was without consideration, or for some other reason, inoperative, or void against him; because, at this stage it would appear to be valid as against the parties to it, and to afford *primâ facie* evidence of what was contained therein. It shews that the execution debtor had no right to the goods seized except as to the equity of redemption, and if so the execution creditor could take no more in execution, as the measure of his rights is what the debtor had honestly to give. Fraud in the transaction is not to be assumed at this stage, and it therefore is the duty of the defendant to give evidence to destroy the effect of the mortgage. As expressed by Wood, V.C., in *Kelson v. Kelson*, 10 Ha. 388, inasmuch as a *primâ facie* case of consideration is raised in the deed the *onus* is on the defendant to avoid it.

The mortgage is expressed to be for so much money paid at or before its execution. There was no evidence to displace this consideration, and though suspicion may arise from the nature or character of the transaction, that would not justify the conclusion that it was a voluntary instrument contrary to its purport. This conclusion is in conformity with the principles of decision in *Elliott v. Hunter*, 24 Gr. 430, reversing the decision in 15 Gr. 640, and in *Whitaker v. Wright*, 2 Ha. 310.

Taking then the instrument as it stands, such consideration was paid at or before its execution. If paid contemporaneously therewith it would be a present advance which would support the security against any but the most cogent counter evidence of fraud. If paid before its date that is by no means conclusive against the instrument. It may be supported by pressure, or by an antecedent arrangement as to getting security, but before the plaintiff is put to prove this, it should appear by sufficient evidence that the wife knew of the husband's insolvency, and concurred with him in an attempt to give a preference at the expense of the other creditors. Upon this there is no evidence, and one can only surmise or imagine in order to find against the validity of the security. For these reasons I think the verdict should be set aside and a new trial had upon the terms as to costs mentioned by my brother Proudfoot.

I also agree with him as to sustaining the verdict against the assignee for creditors.

PROUDFOOT, J.—If this had been the simple case of an action by a mortgagee in possession of the chattels mortgaged to him against an execution creditor of the mortgagor, the production of the mortgage with proof of its execution, would have been sufficient to make out a *primâ facie* title without proof of the consideration. That was the case of *Squair v. Fortune*, 18 U. C. R. 547; where, however, Burns, J., dissented. Robinson, C. J. places it upon the ground that the plaintiffs were claiming under a mortgage of goods executed by Lea, while he had a clear disposing power over them, and they had a right to stand upon their prior title till the sheriff, coming with an execution after the mortgage was executed, has given proof of something that should impeach that mortgage.

And such was the case in *Elliott v. Hunter*, 24 Gr. 430, where under a decree to take the usual mortgage accounts it was held that the mortgage was *primâ facie* evidence of the debt. The Chancellor's (VanKoughnet) memorandum of his judgment being this: "Considering

that both parties are dead, that there is nothing to impeach the \$4,000 mortgage, that subsequent incumbrancers are bound by the statement or settlement between the mortgagor and mortgagee, and that the learned Judge has not found fraud, and that there was undoubtedly some consideration for the mortgage, I think the mortgage should stand, unless the plaintiffs can cut it down; and they should have the opportunity of doing this." To this class of cases may be assigned *Kelson v. Kelson*, 10 Ha. 385, and *Gully v. Bishop of Exeter*, 12 Moore 591, 4 Bing. 290, 5 Bing. 171, 2 M. & P. 105; *Bondy v. Fox*, 29 U. C. R. 64, decides that when a plaintiff calls for a deed in defendant's possession and puts it in evidence it is *primâ facie* evidence of consideration mentioned in it.

But an execution creditor may shew that a prior chattel mortgage is void for want of consideration, or for fraud: *Squair v. Fortune*, *supra*. The want of consideration would be no objection if the mortgagor were in circumstances to enable him to make a gift. On the other hand a consideration would be of no value if the mortgage were made to defeat or delay creditors or a creditor, if the mortgagor at the time were in insolvent circumstances, or unable to pay his debts in full: R. S. O. ch. 118, sec. 2.

In the present case there was evidence to go to the jury of the insolvent condition of the mortgagor, certainly not so clear and precise as could be wished, but sufficient if the jury believed it to justify their verdict. Under this state of facts, in my view, the proof of consideration for the mortgage would not decide the case. *Squair v. Fortune*, was before the 22 Vic. ch. 96, sec. 19, the forerunner of R. S. O. ch. 118, sec. 2, and the validity of the mortgage turned wholly on the presence or absence of consideration.

But there are cases in which a mortgage made even by a person in insolvent circumstances might be valid, as, if it were given for a present advance of money for carrying on the business or other proper purpose. In that case the insolvency would not be a circumstance shifting the *onus* of proof, and the production of the mortgage would be *primâ facie* evidence.

But besides the mortgagee, the assignee for creditors, under an assignment made one day before the execution was placed in the sheriff's hands, is also a plaintiff, and one of the questions at the trial was, whether that was made with the intent to delay creditors.

The R. S. O. ch. 118, sec. 2, does not invalidate an assignment by a debtor for the purpose of paying all his creditors ratably and proportionably without preference their just debts; and upon its face the assignment in terms complies with the statute. But however fair it may be in its provisions, it may have been executed for the purpose of defeating and delaying creditors. The assignee was examined, in fact he was the only witness, and the Judge directs the jury to ask themselves this question, and to answer it upon the evidence. Was the assignment made for the purpose of hindering or delaying creditors? if made with that intent it is bad under the statute. If made honestly, without any intent of that kind, for the purpose of dividing the assets equally amongst the creditors it would be good. There was evidence from which the jury might infer that the assignment was not made for the honest purpose of distribution, but for delay. The assignee was a brother of the debtor, and in his employment, and money he collected under the assignment was employed by him not in paying debts due at date of assignment, but in continuing the business the debtor had been engaged in.

The charge of the learned Judge appears to be correct, and the jury have found upon evidence sufficient to justify their verdict that the assignment was not honestly made, and it does not seem to me that we ought to interfere with their verdict on this point. By so holding no injury need be done to the other creditors for they can claim a ratable share of the sum realized under the execution.

With respect to the mortgage therefore I think there should be a new trial. The parties seem to have confined themselves to the minimum of evidence. But that the

plaintiff did not give more appears to have been from his counsel having been misled by a supposed admission; and the learned Judge refused to allow him to supplement his evidence after he had closed the case. So that the action has not really been tried on its merits.

The application is refused as to the assignee with costs; and granted as to the mortgagee, costs of the former trial and of the new trial to be dealt with by the Judge at the trial.

G. A. B.

[CHANCERY DIVISION.]

ARCHER ET AL. V. SEVERN ET AL.

Will—Specific bequest of a mortgage indebtedness—Right of executors to refuse to discharge until other indebtedness paid—Assent of executor to specific legacy—Administration proceedings.

A testator by his will directed his executors to cancel and entirely release the indebtedness of his son W. S. upon and by virtue of a mortgage to the testator, such release to operate and take effect immediately on and from the said testator's death. In an action for the administration of the testator's estate, W. S. claimed the discharge of the mortgage, but the executors contended that they were not bound to give it until W. S. paid the amount of his other indebtedness to the estate. The Master found in favour of the executors. On appeal from the Master it was

Held, That the executors were not entitled to insist on payment of the other indebtedness before discharging the mortgage.

Held, also, following *Northey v. Northey*, 2 Atk. 77, that although at law the assent of the executor is necessary to the vesting of a specific legacy, in equity he is considered as a bare trustee, and if he refuse his assent without cause he may be compelled to give it, and that here the executors' refusal was without cause.

Held, also, that a decree in an administration suit, although it may enure to the benefit of all creditors of an estate, does not prevent the Statute of Limitations from running against debtors to the estate.

Held, also, that a clause in the answer of W. S. expressing his willingness that the will should be construed by the Court and the rights of the parties thereunder determined had not the effect of waiving any right that might have accrued to him during the progress of the suit.

THIS was an appeal from the report of the Master. The paragraph appealed from is set out in full in the judgment.

The appeal was argued on September 30th, 1886, before Proudfoot, J.

W. H. P. Clement, for the defendant Wm. Severn, who appealed. The testator's will provided that the appellant's mortgage should be discharged, and that the discharge should take effect immediately after his decease. The executors have refused to discharge the mortgage unless a certain other indebtedness (some notes) of William Severn to the estate of the testator are first paid off, and the Master is wrong in finding that the executors have the right so to do. He should have declared William Severn entitled to a discharge of the mortgage irrespective of any other claim, and then William Severn could take advantage of the Statute of Limitations, or any other defence he might have to the notes. When the executors were asked for the discharge they did not decline on the ground of insufficiency of assets. They have assented to it as a legacy. The testator annexed no condition to the enjoyment of the legacy. Even if a pecuniary legacy can be withheld, a specific legacy cannot be so treated; the legatee is entitled to it *in specie*. There is no fund in this case from which the debt could be deducted. In a case of a bequest of leaseholds for the legatee's personal support and maintenance, free from any claim, it was held that the leaseholds could not be withheld until a debt due the testator by the legatee was paid: *Harvey v. Palmer* 4 DeG. & S. 425. I refer also to *Courtenay v. Williams*, 3 Ha. 539, affirmed on appeal 15 L. J. Ch, 204; *MacMahon v. Burchill* 3 Ha. 87; *Campbell v. Graham*, 1 R. & My. 453; *Coates v. Coates*, 33 Beav. 249; *Smith v. Smith*, 3 Gif. 263; *Jeffs v. Wood*, 3 P. Wms. 130; *Cherry v. Boulton*, 4 M. & C. 442; *Re Cordwell's Estate*, *White v. Cordwell*, L. R. 20 Eq. 644.

S. H. Blake, Q. C., and *H. Cassels* contra. If William Severn took proceedings to have the mortgage cancelled the executors should claim the notes against the mortgage. [PROUDFOOT, J.—Could the testator have tacked the notes

to his mortgage?] That is hardly the question here. It is, whether the debt should be set off against the mortgage. The executors are not called upon to discharge the mortgage until the debt is paid. The equity is to set off a simple contract debt against the mortgage debt. The executors should not discharge the mortgage immediately on the death of the testator, as creditors have rights for twelve months, and the mortgage should remain an asset of the estate for that time. In *Harvey v. Palmer*, *supra*, the legacy was given for maintenance, and the mode of enjoyment negatived any right of set-off. A legacy of a specific article is very different from a specific sum or a specific fund. *Harvey v. Palmer* refers to specific articles (leaseholds). William Severn's answer admits his willingness to have the will construed, so the Master must construe it and ascertain what his rights are. On what terms should he get the discharge? Only on the condition of paying his debt. The Statute of Limitations is no bar to the notes, for within the six years, viz, in 1881, William Severn asked by his answer to have his rights adjudicated upon; *Williams* on Executors, 8th ed. 1309, 1310; *Schouler's* Executors and Administrators, sec. 208; *Rider v. Wager*, 2 P. Wms. 331; *Wood* on Limitation of Actions, sec. 198; *Limpus v. Arnold*, 15 Q. B. D. 300; *Cole v. Covington*, 41 Am. R. 458. As to right to set off statute barred debts: *Poole v. Poole*, L. R. 7 Ch. 17; *Bousfield v. Lawford*, 1 D. J. & S. 459. As to need of assent of executors: *Schouler*, sec. 488; *Izon v. Butler*, 2 Price, 34; *Attorney-General v. Holbrook*, 3 Y. & J. 114. As to effect of bequest in connection with bond or instrument being so much money: *Toplis v. Baker*, 2 Cox's Eq. R. 118; *Maitland v. Adair*, 3 Ves., 231; *Roper* on Legacies, 911 and 1069; *Davies v. Nicholson*, 2 D. & J. 693.

Clement, in reply. The proceedings in an administration action do not keep claims alive even between the parties to the action unless it is brought for the debt. An action by a creditor for himself and all other creditors would keep his debt alive and run for the benefit of all

creditors coming in under the decree, but this is a suit for the construction of a will. See *Darby* on the Statute of Limitations, 616-617.

October 23, 1886. PROUDFOOT, J.—This is a suit by the executors of John Severn, in which a decree was made for the administration of his estate. The Master has made a report by which, among other things, he finds :

“Par. 11. By his will the testator directed his trustees (the executors named in the will) to cancel and entirely release and discharge the indebtedness of his son, the defendant William Severn, upon and by virtue of a mortgage to the said testator for \$17,000, or thereabouts, such release to operate and take effect immediately on and from the said testator’s death. The said defendant William Severn claimed to be entitled to have his said mortgage discharged, but the surviving executors claimed before me that the said defendant was otherwise indebted to the said testator, and I find that in addition to and over and above the said mortgage for \$17,000, the said defendant was indebted to the said testator at the time of his death in the sums following, viz : Firstly, the sum of \$2,500, and interest, &c., the interest amounts to \$1,085.40. Secondly, the further sum of \$160.51, for goods, &c., making in all \$3,745.91. And I further find that the said defendant William Severn is not entitled to have his said mortgage discharged as claimed by him until he pays to the said executors, or otherwise discharges the said sum of \$3,745.91.”

William Severn appeals from this finding of the Master, because by the will upon its proper construction he was entitled to have the mortgage discharged without reference to the alleged indebtedness of the appellant to the testator, or to the payment thereof by him. And because the Master should have found that the legacy had been assented to by the executors, or one of them. And that the Master should have found that the appellant was only indebted in the sum of \$500, with interest, from the 11th June, 1880.

A paragraph in the answer of William Severn to the bill was relied on by the respondents, viz.: "7. I am willing that the said will should be construed by this Honourable Court, and the rights of the parties thereunder determined." It was argued from this that, if it should be held that the executors were not entitled to refuse to discharge the mortgage till payment of the further debt, it precluded the appellant from setting up the Statute of Limitations, which would otherwise protect him from the notes for \$2,500.

The main question resolves itself into this: Is a specific legatee entitled to his legacy without discharging a sum in which he may be indebted to the testator?

There is no doubt that in the case of a general legacy, where the legatee is indebted to the testator, the executor may retain the legacy, either in part or full satisfaction of the debt: *Jeffs v. Wood*, 2 P. Wms. 130; *Smith v. Smith*, 3 Gif. 263, although barred by the Statute of Limitations: *Courtenay v. Williams*, 3 Ha. 539; affirmed, 15 L. J. Ch. 204.

But the question is different where the bequest is specific. The counsel were unable to refer me to any case in which it had been held that the right of retainer existed in regard to a specific legacy. The appellant contended that in the case of a pecuniary legacy the principle is not that of lien or set-off; but that the money in the hands of the legatee, being part of the assets, may be appropriated by the executors to the payment of the legacy; that such a principle is inapplicable to the case of a specific legacy, which cannot be said (as a pecuniary legacy can) to have been in part paid by the money in the legatee's hands. On the other side it was said that there was a difference between a specific legacy of a specific chattel, such as the "Pusey Horn," and a legacy of a mortgage, which was an asset of the estate: *Rider v. Wager*, 2 P. Wms. 331, 332; that in the former their might be no ground for retaining the chattel until payment of the debt, while in the latter the executors could collect the asset, and deduct the debt.

The only case in which the subject seems to have been discussed, is *Harvey v. Palmer*, 4 DeG. & S. 425, where under a bequest of leaseholds for the legatee's personal support and maintenance, and to be entirely free from any charge or demand or lien of his creditors, it was decided that the leaseholds could not be withheld from the legatee until he paid a debt due from him to the testator. The Vice-Chancellor, Knight Bruce, assumed for the purpose of that case, without deciding, that, if a specific legatee is indebted to the testator, the legacy may be withheld till the debt shall be paid. For he found that the testator had expressed that which was equivalent to a declaration of intention, that the executors should not withhold the property from the legatee on the ground of the debt.

That case is referred to in *Williams on Executors*, Vol. 2, 1315, 8th ed., where it is said that his Honor seemed to doubt whether, in any case, where a specific legatee is indebted to the testator, the legacy can be withheld till the debt is paid.

There is no other case that I have been able to find in which the subject was discussed, and in this it is left undecided.

The appellant further urged, and it is an argument entitled to consideration, that the will itself discloses an intention that the executors should not withhold the property from the legatee on the ground of the debt, as the testator directs the release to operate and take effect immediately on and from his decease. Effect could not be given to this direction if the executors were to be entitled to collect the asset and pay the unsecured debt.

In the absence of decisions upon the subject in the English law, recourse may be had to the civil law, which is the source of so much of the English law relating to legacies. In the Digest there is a title, XXXIV. 3, *de liberatione legata*, of releasing from a debt by last will or testament, in which various cases of the kind are stated. The first text under this head, sec. 1, declares: "*Si res pignori data legetur debitori a creditore, valere legatum,*

habereque eum actionem, ut pignus recipiat, priusquam pecuniam solvit: sic autem loquitur Julianus, quasi debitum non debeat lucrari; sed si alia testantis voluntas fuit, et ad hoc pervenietur exemplo luitionis." If property given in pledge is bequeathed to the debtor by the creditor, the legacy is valid, and (the debtor) has an action (against the heir of the creditor) to recover the property pledged, *before he pays the money*; but in such a manner, Julianus says, that the legatee should not be enriched by (released from) the debt; unless the testator had expressed such an intention, when it would have the effect of payment. (See D. L. 16, 47.)

By a bequest of the pledge the debt is not presumed to be released. For in bequeathing the pledge which is the accessory, the debt which is the principal is not released: to the same effect is the law in the title *De Pactis* (D. II. 14, 3): *Postquam pignus vero debitori reddatur: si pecunia soluta non fuerit, debitum peti posse dubium non est.*

It thus appears that when a testator bequeathed the property pledged, the debt for which it was a security was not released, and yet the legatee could insist upon the release of the pledge before paying the debt. If that were the case where the testator had a security for the debt, with how much greater reason might the debtor insist upon release before payment where the debt was not secured.

In the case before me the debt secured by the mortgage is directed to be released, *i. e.* the principal, and the mortgage, *i. e.* the accessory, would also have to be released (C. VIII. 27.7.)

This mode of treating the legacy is not at variance with our law, and is a reasonable way of construing the direction of the testator, and most probably giving effect to his intention. I shall therefore hold that the executors were not entitled to insist upon payment of the \$3,745.91 before discharging the mortgage.

But it was contended that the assent of the executors was necessary to perfect the title of the legatee, and that had not been given. In *Northey v. Northey* 2 Atk. 77, Lord Hardwicke says that at law the assent of the executor is necessary to the vesting of a specific legacy, but in equity he will be decreed to deliver it, being considered there as a bare trustee. Or, as the rule is otherwise stated, if an executor refuse his assent without cause, he may be compelled to give it. Com. Dig. Administration (c. 8) 2 *Williams* on Executors 1380. 8th ed. And the case of *Harvey v. Palmer*, 4 DeG. & S. 425, was a suit to compel the assent of the executors. If I am correct in the view I take of the right of William Severn, the executors refuse without cause.

It was argued for the executors that the filing of the bill on the 22nd March, 1881, and the decree for administration made on the 13th of February, 1882, prevented the Statute of Limitations from running against the notes made by William Severn.

In a creditor's suit for the administration of assets the decree is in the nature of a judgment for all the creditors, under which they may all come in and obtain payment; *Kerr* on Injunctions 107, (ed. 1867), and a decree in an administration suit instituted by two executors against a third, was considered a decree for the benefit of all the creditors: *Macrae v. Smith*, 2 K. & J. 411.

In *Sterndale v. Hankinson* 1 Sim. 393, it was held by Sir Anthony Hart, V. C., that a bill which had been filed by one creditor on behalf of himself and all other creditors prevented the Statute of Limitations from being a bar to the claim of another creditor who had come in under the decree. See also *Birmingham v. Burke*, 2 J. & Lat. 699. But in *In re Greaves*, deceased, 18 Ch. D. 551, Sir George Jessel, M. R., said that creditors had better not rely upon that decision for the future.

But assuming the rule to exist, I fail to see how it applies to this case. If it prevent the statute being a bar to the claims of creditors, how can it prevent the debtors

to the estate from protecting themselves? The decree is to administer the assets of the estate come to the hands of the executors, but it is not a proceeding against the debtors. And as to the assets that consist of *choses in action*, the law has long been settled, that although debts of every description due to the testator are assets, yet the executor is not to be charged with them till he has received the money: 2 *Williams* on Executors, 8th ed. 1675. And to get them into his hands he has to bring an action for the purpose.

I do not think the clause in the answer of William Severn, expressing his willingness that the will should be construed by the Court, and the rights of the parties thereunder determined, has the effect of waiving any right that might accrue to him during the progress of the suit. Besides, the bill was filed for the purpose of determining the claim of George Severn, one of the executors and a legatee and devisee under the will, and prayed for a construction of the will in respect of the matters aforesaid, *i. e.*, the claim of George Severn, and to determine the rights of all parties in connection therewith. The answer of William Severn must be read in connection with that, and was only an expression of willingness to have the rights of the parties under the will determined so far as affects the claims of George Severn. It was only at the hearing that an administration was asked, and not being objected to, was granted.

The appeal is successful on every point, and is allowed, with costs.

G. A. B.

[CHANCERY DIVISION.]

JAMES V. THE ONTARIO AND QUEBEC RAILWAY COMPANY.

Railways—Expropriation of lands—Method of fixing compensation—The “taking”—Allowance of interest to landowner.

In fixing compensation to a landowner for lands expropriated by a railway, the rule is, to ascertain the value of the land of which it forms a part before the taking, and the value of such land after the taking, and deduct one from the other, the difference thus arrived at being the actual value to the owner of the part taken.

Rule laid down by Cameron, C. J., in *Re arbitration between The Ontario and Quebec R. W. Co. and George Taylor*, 6 O. R., at p. 348, followed.

The “taking” is properly fixed as at the date of the company giving notice to the landowner of their intention of taking the land; and it is not correct to say that the value of the lands should be taken as of a date prior to knowledge of intention to construct, or in anticipation of the construction of the railway.

Interest is properly allowed to the landowner on the amount of his compensation from the time of the taking as above defined to the time of the award.

THIS was an appeal from the report of Joseph E. Macdougall, then Junior Judge of the County Court of the county of York, made by him pursuant to an order made on April 1st, 1884, in this action, which was brought by one Silas James against the Ontario and Quebec Railway Company, whereby it was referred to him as sole arbitrator under the Railway Act of 1879, and as an official referee under the provisions of the Ontario Judicature Act, 1881, and the rules of this Court, to fix the compensation payable to the plaintiff by the defendants for the land to be taken by them for the purpose of the railway, including the making a diversion of a certain street called Charles street; and to ascertain what damages the plaintiff was entitled to by reason of such taking.

The facts of the case and the grounds of this appeal appear from the judgment and the argument of counsel for the appellants.

The appeal came on for argument on Tuesday, October 5th, 1886, before Ferguson, J.

R. M. Wells for the railway company, appellants. The main objection to the award is the principle proceeded on. The learned referee has taken the increased values caused by the anticipated construction of the railway on August 23rd, 1883. He finds a difference between the whole as it would have been untouched and the part taken to be \$2,558.75, which is the value of the land taken as increased by the railway. He says, take the \$2,558.75 and deduct from it what the part left has increased in value by reason of the railway. He should have taken the value of the land as it was, independent of the railway, and then deducted from it the amount by which the balance of the land is increased in value by the railway. As to Lot 1, he first says the balance of the land left by the railway is worth \$540. Yet he afterwards says the value of this balance is depreciated by the proximity of the railway over \$335.67, and then deducts this amount from the \$540. Our plan was filed January 4th, 1882, and the line was located on the plaintiff's ground in June, 1882. The plain duty of the referee was to take the value at that date, *i. e.*, the date immediately before the filing of the plan—the value then, entirely irrespective of the railway. He should then have charged the railway company with the actual value of the land taken at market value; then added to it any damage done by the railway to the land left, and then deducted from that the increased value given to the remaining part by the construction of the railway. This is the method always adopted in my experience. In other words, the owner of the land shall not get the advantage of an increase which the company itself has created. The referee has given him this advantage. This is the sum of our objection. [FERGUSON, J.—Suppose it was urged that by “increased value,” in 42 Vic. ch. 9 (D.), the Railway Act of 1879, was meant the increased value to the individual proprietor whose lands are taken over and above the increased value given to lands in general in the neighbourhood. What do you say to that?] The case of *Re Credit Valley R. W. Co. and Spragge*, 24 Gr. 231, I think, shews that it does not mean this. I cite the *Great Western*

R. W. Co. v. Baby, 12 U. C. R. 106, 119, decided under a similar section. This goes to shew that it would be very absurd to make the railway pay the owner for advantages created by itself. See also, *Baby v. Great Western R. W. Co.*, 13 U. C. R. 291, which shews that the railway is to be allowed for the increased value given by it to the land: *Re Canada Southern R. W. Co. v. Norvall*, 41 U. C. R. 207; *California Pacific R. W. Co. v. Armstrong*, 46 Cal. 85; *Betts v. The City of Williamsburg*, 15 Barb. 255; *Rexford v. Knight*, *ib.* p. 627; *Livingstone v. Mayor of New York*, 8 Wend. at p. 101; *Redfield on Railways*, 4th ed. p. 262 may be referred to on the same point. And as to what is the "taking," see *Pierce on Railroads*, p. 209. *Davidson v. Boston and Maine R. W. Co.*, 3 Cush. 91, 106, shews the "taking" begins when the plan is filed. So too *Boydton v. Peterborough and Shirley R. W. Co.*, 4 Cush. at p. 469 is to the same effect.

Delamere and *English*, contra. *Pierce on Railroads*, p. 211 and all the books shew that the cardinal rule is to take the value of the land before the taking, then the value of the balance after the taking and deduct the latter. This is what the learned Judge has done. This leaves what we should have apart from the consideration of the Act, the effect of which is to require the increased value given to the balance of the land to be deducted. In *Re Arbitration between Ontario and Quebec R. W. Co. and Taylor*, 6 O.R. 338, the same rule is laid down. The deduction that is to be made is to be made in respect to the balance of the land. The weight of authority is in favour of this construction of the statute, and is in accordance with what the Judge below has done. He takes certain lots on which there is an increase, he takes another lot on which there is a decrease, and he deducts the net increase. [FERGUSON, J.—Your plan is, take the value of the whole lot first, then the value of the land remaining, and subtract, and any balance is the measure of damages at Common Law. When do you compute these damages?] That is settled as being the time when the land is actually taken: *Pierce on Railroads*, p. 211. The time of the notice is the proper time.

Wells, in reply. *Pierce* on Railroads, p. 209-210 shews what is meant by the "taking." I refer also to sec. 11 of the Act of 1884. The time of taking is the date of the filing of the location. Where the referee has gone astray is in charging us with the increased value which we have ourselves put upon the land. Then we have wrongly been charged interest from the time of the notice, viz.; August, 1883. The ordinary principle is to charge interest only from the time of actually taking possession. We took possession in August, 1884.

October 6th, 1886. FERGUSON, J.—This is a motion made by the defendants for an order setting aside and vacating the award of the arbitrator under the Railway Act of 1879 and official referee under the provisions of the Judicature Act, whereby the sum of \$1362.72 is found to be owing to the plaintiff as compensation for lands taken by the defendants for the purposes of the railway, or in lieu of a public street taken by them, which in effect is the same thing. At all events there is no dispute as to any difference there may be.

This appears to be the second report made by the referee, the first one having been set aside as to the amount found due only, and the matter referred back to him by an order made on the 3rd day of November, 1885. The grounds of the present motion as stated in the notice of motion are as follows: Because the learned referee has arrived at the loss, \$2558.75, as mentioned in paragraph 3 of his report, by deducting the increased value of the part taken by the right of way of the defendants' railway from the increased value of the whole property of the plaintiff; whereas the said referee should have charged the defendants only with the actual value of the land taken from the plaintiff, irrespective of its value as increased by the railway; and whereas the said referee should have given the defendants credit for the increase in value given to the part of the plaintiff's lands left, by reason of the railway.

The defendants appear to have given a subsequent notice that on the motion they would contend that the report should be set aside, on the ground that the referee had charged the defendants twice in respect of the same item, namely, what is called in the report lot one, and on the ground that the referee had allowed interest to the plaintiff on the amount found due to him.

The learned referee found that the defendants first intimated, by a notice dated the 22nd day of August, 1883, their intention of taking the lands, which notice contained a description by metes and bounds of the lands proposed to be taken. He also found, that for the purpose of the reference to him, the date of the taking of the land by the defendants was at or about the 22nd day of August, 1883, being the date of the service of the notice.

There was no objection made or urged as to the findings in respect of the values of the lands or any of the parcels of them at the particular times mentioned in the report; on the contrary of this these findings were said to be correct.

What was complained of in the argument was the method adopted by the learned referee for the purpose of arriving at his conclusion and, of course, the conclusion itself.

This method appears to have been this: Having fixed for the purposes of the reference the date of the taking of the lands, the learned referee ascertained the value of the the plaintiff's land at that date and before the "taking." This value he found to be \$9321.75, having valued it on the evidence in three parcels or sub-divisions.

He then, on the evidence, placed a value upon the plaintiff's land that was left him, taking off the portion that was required by the defendants. This value seems to have been fixed as of the same date as the value of the whole of the land, and he found it to be \$6763. He then deducted one of these sums from the other; the difference being \$2558.75. This difference, the learned referee says in his report, represents the loss to the plaintiff by the taking of the portion of the land by the defendants with-

out deducting therefrom any advantages conferred upon the plaintiff's land by the construction of the railway.

This sum of \$6763 is arrived at by allowing \$3675 for one parcel fronting on Summerhill Avenue, \$2548 for a parcel fronting on Charles street, and for the parcel known in the proceedings as lot 1, \$540. This lot 1 is a triangular piece of land lying at the easterly extremity of the land in question. The amount of these three sums being the \$6763, deducted as aforesaid from the \$9321.75 leaves as before stated the sum of \$2558.75.

The referee then proceeds to ascertain the increase in value, by reason of the construction of the railway, of the portions of the land left to the plaintiff. In doing this he placed upon the two parcels aforesaid fronting respectively upon Summerhill avenue and Charles street, neither of them being lot 1, what he calls their original value, which appears by the eleventh paragraph in his first report, to be the value found by him as the value at the nearest date prior to the fact becoming known of the intention to construct the railway, and he finds that this original value has been increased by the construction of the railway \$1102.50 as to one of the parcels and as to the other parcel \$529.20 these two sums of increase being together the sum of \$1631.70. But as to the other parcel, (lot 1) the referee says "I find however that the triangular lot 1 in its reduced area of fifty four feet would have been worth \$875.67 had not the close proximity of the railway considerably depreciated its value, (the value of the same I have placed at \$540 in paragraph two of this my report.) There has, therefore, been a direct loss in value upon this lot equal to \$335.67, which, in my opinion, has been due to the construction of the railway, and this sum must therefore be deducted from the sum of \$1630.70 the sum of the increase due to the railway construction," and he accordingly makes this deduction, leaving the total net increase by reason of the construction of the railway \$1296.03, which he deducts from the \$2558.75, leaving the net damages for the land \$1262.72.

In placing a value upon the plaintiff's land as it was before the "taking" by the defendants, he valued the same lot 1 at \$1200; and in placing a value upon the lands left the plaintiff, after taking off the portion that was required by the defendants, he valued what remained of this lot at \$540. This plainly appears in the second paragraph of the report. In the third paragraph he says it would have been worth the \$875.67 had not the close proximity of the railway considerably depreciated its value, and he deducts from the \$875.67 the \$335.67 and obtains the same value, \$540. Now I fail to understand this in any way other than that the defendants have had this sum of \$335.67 twice reckoned against them, once in placing the small value of \$540 on the remainder of lot 1 in the second paragraph of the report, and again in deducting it from the increased value of the other two parcels, the \$1630.70, and to this extent I think the motion should succeed upon the first ground mentioned in the subsequent or supplemental notice of motion.

As to the ground stated in the original notice of motion, in the case *The Ontario and Quebec R. W. Co. and Taylor*, 6 O. R. at p. 348, Cameron, C. J. says: "It appears to me the value of the land taken is to be determined by ascertaining the value of the land of which it forms a part before the severance, and the value of such land after the severance, and the difference will be the actual value to the owner of the piece taken. This method will give the owner a just compensation for the enforced expropriation of his land; and if the whole land is enhanced in value, a question that must enter into the estimate of the amount to be awarded to the owner, the railway company will get the benefit of the value given to the lands by the railway in setting off such enhanced value against any damage resulting to the owner from the taking of the piece expropriated through inconvenience or depreciated value from severance."

This seems to me to have been precisely the method adopted by the learned referee, and it appears to me to be a proper one.

In *Pierce on Railroads*, at p. 210, it is said: "Where the owner's whole tract or lot is taken, the market value at the time of the taking is the measure of compensation," and on page 211 the same author says: "The general rule of damages, which covers the part taken and the injury to the remaining land, is, that the owner is entitled to the difference between the market value of the whole lot or tract before the taking and the market value of what remains to him after such taking."

This appears to be in accord with what is said by Chief Justice Cameron as above; and after having perused the authorities to which I was referred, I cannot say that I have detected anything sufficient to lead me to question the propriety of this method of arriving at the damages. Then as to the date fixed by the learned referee as the date of the taking of the land, I am of the opinion that he was right.

I think the defendants cannot succeed, upon the ground stated in the original notice of motion.

Another ground taken in the supplemental notice of motion and in the argument was, that the referee had improperly allowed interest from the 22nd day of August, 1883. The objection was that no interest should have been allowed.

In *Pierce on Railroads*, at p. 220, it is laid down that interest from the time of the "taking" or the time when the land owner becomes entitled to the compensation to the time of the award or verdict is to be added to the amount of damages found due the party; and this even though the amount may have been deposited in Court, or the land owner has not pressed his suit, and that the owner is entitled to interest for such time though he remains, by permission of the company, in possession for some time after; but that interest is not recoverable for the period when the company could not lawfully have had possession.

I am of the opinion that in this case the award of the interest to the plaintiff is not objectionable and the defen-

dants I think fail on this ground of motion. There was no dispute as to the \$100 allowed for the trees that were injured.

I am of the opinion that the report should be referred back to the learned referee, but only in respect of this sum of \$335.67 and any difference that this may occasion in working out the result.

I think there should be no costs to either party.

Order accordingly.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

JOHNSTON V. SHORTREED ET AL.

Agreement for sale of timber—Construction of—Right to cut and remove logs after time limited—Grant subject to condition—Trespass.

By deed, dated 4th April, 1884, made between J. and S. & L., J. agreed to sell and S. & L. to purchase all the merchantable pine, suitable for the purposes, standing, lying, and being on certain described property, for a sum which was then named and paid, "Provided, however, that the said timber and logs shall be cut and removed off said lot on or before the 4th of April, 1884."

The defendant B. (claiming through S. & L.,) after the expiration of the time agreed upon, removed logs which J. had cut after said 4th day of April, 1884, and for this J. brought this action and recovered a verdict for \$125.

B. moved against the verdict, on the ground that under the deed, and the assignment to him, he was the absolute owner of the timber, subject merely to such claim as the vendor might have against the vendees for breach of the covenant to remove the pine within the time named.

Held, (O'CONNOR, J., dissenting,) that the agreement could not be construed as an absolute grant of the pine trees suitable for the business of the grantees, subject to a *covenant* by them to cut and remove the trees within 10 years; *but* that it was a grant of the pine subject to the *condition* that the timber and logs should be cut and removed off the property on or before the 4th day of April, 1884.

Held, also, that this condition applied as well to trees severed before as to those severed after the expiration of the term.

Held, per O'CONNOR, J., that the case was within the meaning of the law as decided by the Court in the case of *McGregor v. McNeil*, 32 C. P. 538, and that the defendant was the absolute owner of the timber, with an affirmative license to cut and remove the same, which the vendor could not revoke, although the time within which the timber was to be removed had expired; though the vendor might have other remedies.

TRESPASS by the defendants to the south-east quarter of lot 15, in the 6th concession of Medonte, on divers days and times since of the 4th of April, 1884, of which the plaintiff had been and was the owner since that day.

The defendant Shortreed had the action dismissed as against him. The defendant Barr was found guilty and damages assessed against him to the extent of \$150.

The facts were that on the 4th of April, 1874, plaintiff, by deed made between him, of the first part, and Shortreed and Laidlaw, of the second part, agreed to sell, and the parties of the second part agreed to purchase "all the merchantable pine suitable for their purposes, standing,

lying, or being on the south-east quarter of lot number 15, in the 6th concession, of the township of Medonte, for the sum of \$125, payable on the day of the date hereof, the receipt whereof I hereby acknowledge. Provided, however, that said timber and logs shall be cut and removed off said lot on or before the 4th of April, 1884.

* * The party of the first part to have the right to clear the said land as he may require to do so: provided, he shall not cut the said pine trees until the 1st of June in any year during the said term, and shall skid up such pine trees in a proper way. * * The party of the second part will pay to the party of the first part current value for cutting and skidding said pine logs and timber."

The defendant Barr was the assignee of Shortreed and Laidlaw.

The action was tried by Armour, J., when the learned Judge decided the defendant had no right to cut and remove pine trees after the 4th of April, 1884, as he did. It might be, he said, that the word *proviso* in the agreement ought to be construed as a covenant, but he did not think, if so construed, it would carry out the intention of the parties. He, therefore, assessed the damages against Barr in respect of the timber taken after the 1st of April, 1884, at \$125; and the further sum of \$25 for damages occasioned to the plaintiff by reason of the fire set out by the defendant; and judgment was given against the defendant Barr for \$150 damages, with costs.

The defendant's solicitors gave notice of intention to move to set aside the judgment against Barr for the \$125 damages, on the law and evidence, in this, that the property, for which the sum of \$125 damages was given, was at the time of the alleged conversion the property of the defendant Barr.

December 2, 1886. *Pepler* in support of the motion, referred to *McGregor v. McNeil*, 22 C. P. 338; *Summers v. Cook*, 28 Gr. 179.

Strathy, Q. C., contra, cited *Needler v. Campbell*, 17 Gr. 592; *Toronto Dairy Co. v. Gowans*, 26 Gr. 290.

December 23, 1886. WILSON, C. J.—It was argued that the sale of the growing pine trees for the purpose of being cut and removed from the land, converted them into goods and chattels, and that I think cannot be disputed.

The defendant further contended that although the term within which he was to enter and to cut the timber had expired, he still had the right to remove at any rate the timber he had cut within the term, and which was lying upon the land, because such trees were certainly his goods and chattels, and the property in them had become vested in him from the time of their severance from the land, and could not be divested from him by the mere lapse of time. The plaintiff, in the examination before the trial, said after the ten years the defendant took away pine, what was already cut down; they didn't cut down any themselves, nor their men. His claim was for the defendants' coming on the place after the time expired and taking pine away already cut down. He does not know if the defendants took any pine away he the plaintiff had cut down: it was done last fall, a few months ago. "My whole claim is for their keeping the land for two years after the time, and for taking timber already cut for our own use. Anything they cut down they cut before that time."

The plaintiff was not examined: his son, who was examined, said his father's health was very poorly; he was getting a pretty old man, and it appeared he was not able to be examined.

The plaintiff's son at the trial said Barr, in the spring of 1885, cut and removed timber. He took away about 300 pieces then, and again in July after he took 350 pieces. The logs he took in summer. The witness said he, the witness, had cut most of them himself. They were standing, lying, and green timber. The witness cut them up after seeding in May or June, 1885. They were worth \$500.

In cross-examination he said: "I do say Barr cut logs after the 4th of April, 1884. I say so positively, I was looking at him. He cut and drew also both in July and August. In April he cut 10 or 12 days, and 7 or 8 days in July and August. He had sufficient men cutting for him. My father said if he got the land he would be satisfied for that," (what he means I do not know) "but not for the timber. We cut about 500 pieces of the 650 we were clearing at that time."

The witness was reminded several times what his father had sworn to, but it did not change his evidence.

I need not go over the rest of the evidence, for although the father said what has been stated, he is an old man and in bad health, and it is the fact, according to the evidence, that Barr had cut as well as removed timber after the end of the term.

Barr said he did not cut a single pine tree on this lot after April, 1884. He denies having taken in 1885 the logs which Johnston said he had cut in that year.

The finding of the learned Judge against Barr, for cutting and removing timber after the ten years had expired is well sustained by the evidence.

The case of *Stukeley v. Butler*, Hob. 168, is an early case on the subject. There a grant of all woods, underwoods, &c., on a certain manor to one for life was held good. There were subsequent words in the grant which professed to restrict it to such woods, &c., which could be conveniently spared, which was held void for uncertainty; and to restrict it also by the covenant of the grantor to his right to take the woods, &c., *during the period of five years*; but it was said that even if there had been a covenant by the grantee not to cut after the term of five years, the grantee could, after the larger grant for life, continue to cut, but he would be answerable on his covenant.

There is nothing here said of the grant of the trees and to cut and remove them for life being inoperative, nor that such a grant for the five years would have been

void. Such a grant is treated, as it would have been, quite valid.

At page 173, it is said: "It is clear that by the grant of the trees by a tenant in fee simple, they are absolutely passed away from the grantor and his heirs and vested in the grantee, and go to the executors or administrators, being in understanding of law divided, as chattels, from the freehold; and the grantee hath power, incident and implied to the grant, to fell them when he will without any other special license, which can never be restrained by a power given by the grantor in the affirmative, which the grantee had before. And therefore if one granted a rent of £10 a year to husband and wife for their lives, and if the wife survive, that then she shall have £3 a year for her life; and judged she should hold her £10 a year; otherwise, if it had been said that she should have £3 a year, and no more."

This agreement cannot, however, be construed as an absolute grant of the pine trees suitable for the business of the grantee, subject to a covenant by him to cut and remove the trees within the ten years. It is a grant of the pine trees subject to the condition by the words, "Provided, however, that said timber and logs shall be cut and removed off said lot on or before the 4th of April, 1884."

Provided is in this case a condition, not a covenant: *Sheppard's Touchstone*, 122, 123; so that if the trees are not cut and removed within that time, the grant is determined, and if they are removed by that time the subject of the grant is gone. If the grant had been just as it is in the general form, with a covenant by the grantor to cut and remove the timber within the ten years, the trees would have passed absolutely to the grantee, and if he cut after the ten years, the trees would still have been his property, but he would have been liable on his covenant for not having cut within the ten years.

That is not this case. The term of ten years was the limitation of the grant, by the term of ten years being

stated by way of condition. It is quite clear from Hobart, 173, the grant of the trees without limitation is the grant of a chattel, and the subject of the grant will pass to the personal representatives as personal property.

In Vin. Abr. "Trees," H. pl. 1, 3, 9, the trees, if granted, are held to be chattels, although an inheritance may be had in a tree: *Liford's Case*, 11 Co. 49 *a*, 49 *b*, 2 Inst. 403.

In *McGregor v. McNeil*, 32 C. P. 538, it was held that the purchaser of pine timber, to be removed within a certain specified time, had the right to remove the timber after the time had expired, which he had cut within the time named; for the timber had become his property by severance. The contract in that case was a mere writing given by the grantor that he had sold to the grantee all the pine timber upon the particular lot for \$60, "said timber to be taken off during the year of 1880 and 1881."

It was not a question there whether the grantee had not obtained an absolute right to the pine timber for life, subject to liability if he did not remove it within these years. If that was the relative position of the parties, as it would seem to have been from the case in Hobart, the plaintiff rightly succeeded in his replevying of the timber which the owner of the land had seized. That trees may be sold as chattels is quite settled, for they are in fiction of law thereby removed from the land: 11 Co. 50*a*.

The defendant Barr cut and removed timber after the expiration of the ten years. I am quite clear Barr had not the right to cut after the end of that term; for his grant was subject to the common law condition, the legal effect of the proviso in the agreement, that the logs and timber should be cut and removed by that time.

The trees at any rate under this condition ceased to be any longer chattels, and became again parcel of the freehold. They may be likened to tenants' fixtures, that must be severed from the purchase before the expiration of the term, and if not severed before then cannot be severed after, for they become, or rather remain then parcel of the freehold.

The tenant's fixtures themselves are not saleable as goods and chattels while attached to the freehold, but *the right of severance* of them is saleable: *Lee v. Gaskell*, 1 Q. B. D. 700; *Hallen v. Runder*, 1 C. M. & R. 266.

I do not cite any other of the numerous cases on tenant's fixtures, nor upon the sale of trees.

I find no difficulty in deciding that Barr had no right to cut after the end of the ten years. The question then is, had he the right to remove from the land the trees he had cut before the end of the term? The evidence shewed that nearly all the trees removed by Barr after the term were trees and logs cut by the plaintiff after the term.

The cutting before the term expired was lawful; but the condition, by reason of the word *provided*, applies as well as to the removal of the trees from the land which had been cut before the end of the term as to the further cutting.

It is true the property in the trees, which were cut within the term, became vested in the grantee, but not more so than the property in the trees themselves had been vested in him before they were cut; and if he could not cut the trees after the term had expired, I do not see what greater right he had to remove after the term those he had cut within the term, for by reason of the *condition* the defendant Barr could no more remove after the end of the ten years the trees cut within the term than he could after the end of the term cut trees any longer under that grant.

The evidence is, and the learned Judge reports, that he allowed the \$125 to the plaintiff only for the timber the plaintiff had cut after the ten years, and the defendant had hauled away [of course] after the ten years. That being the case there is no question arising as to the defendant hauling off after the ten years any of the timber he had cut before the expiry of the term.

I agree with the judgment of the learned Judge at the trial, and think the motion of the defendant should be dismissed with costs.

ARMOUR, J., concurred.

O'CONNOR, J.—[After setting out the agreement, the learned Judge proceeded :]

From 1881 to 1886, by several arrangements between Shortreed & Laidlaw and the defendant John Barr, and afterwards between "Shortreed Brothers" (successors of Shortreed & Laidlaw) and the said John Barr, he, John Barr, obtained the right from time to time to cut and use the timber owned by those firms successively on the said part of lot 15 in the 6th concession, and for a time before the expiration of the ten years, which expired on the 4th of April, 1884, according to the agreement of the 4th of April, 1874, Barr was running the saw mill on a piece of land adjoining that part of lot 15, and was getting saw logs from that part of 15 to be sawn at the mill.

The timber sold by the plaintiff was not removed before the 4th of April, 1884, but some was removed in 1884, after the 4th of April, and more was removed in 1885. It is alleged on behalf of the plaintiff that some of the timber removed after the 4th of April, 1884, was cut as well as removed by the defendants.

The defendant John Barr, denies that he *cut* any timber on the place after the 4th of April, 1884, but he admits that he drew timber therefrom which had been cut before. The plaintiff, however, seems to set that question at rest. In his examination, which took place on the 25th of January, 1886, before the trial, he says ; " After the time was up they took away what was cut down ; they did not cut down any timber themselves ; their men didn't cut any either. It was just pine they took away, it was timber that was cut down and windfalls. * * * They did no damage to the land, except making a pad or short cut across the land. My claim is for them coming on the place after the time expired, and taking pine already cut down. They just took whatever they considered fit for mill business. It was done last fall, a few months ago. I don't claim for anything done before last fall. I mean within the last four or five months." Further on the plaintiff, still under examination, says that the defendant Barr put a fire out in

his mill yard to burn brush, "and it spread on to my land ; it ran through something like an acre or two and burned up some brush and some timber ; it was set out I suppose about October, 1884. I had been trying to clear it before the fire was put in ; it is cleared since."

What the plaintiff's claim is for is therefore clear enough. Johnston's son, Thomas, in giving evidence industriously tried to enhance the claim, and stated that part of the timber removed was cut after the 4th of April, 1884 ; and though positive, he is very indefinite, especially as to any number of trees or quantity of timber cut and removed after the 4th of April, 1884. However, it is immaterial, as the plaintiff does not claim that any timber was cut and removed by the defendants after that time. He claims only for the timber removed which had been cut by the defendants before, and by the plaintiff, after that date.

Then, so far as the claim for the timber is concerned, I think the law, as indicated by the authorities, is against the contention of the plaintiff. The case of *McGregor v. McNeill*, 32 C. P. 538, is almost on all fours with this case, and is completely opposed to the plaintiff's claim. The principal authorities are there commented on by Mr. Justice Galt and Mr. Justice Osler, with whom the Chief Justice of this Division, then Chief Justice of that Court, concurred. The old cases of *Stukely v. Butler*, Hob. 173, and of *Buxton v. Lister*, 3 Atk. 383, distinctly sustain the decision in our own Court, 32 C. P. So also does *Marshall v. Green*, 1 C. P. D. 35, I refer also to the able judgment of Proudfoot, V. C., in *Summers v. Cook*, 28 Gr. 179, at p. 186, dissenting from the majority of the Court, and the reference therein to *Sheppard's Touchstone*.

I am disposed to doubt the authority of that case, as decided by the majority of the Court.

The view expressed by Proudfoot, V. C., in the judgment just mentioned, is clearly and strongly set forth in note (y), at p. 126, of *Benjamin on Sales*, (Boston edition of 1881, by Bennett), which is sustained by reference to a large number of cases, American, English, and Canadian

including New Brunswick cases. In *McCarthy v. Oliver*, 14 C. P. 290, Richards, C. J., seems to lay down the doctrine that the sale of standing trees is the sale of an interest in land within the meaning of the 4th section of the Statute of Frauds. But a license to go upon land and cut down trees may be good though by parol; "and," he adds, "even if it be a license accompanied with an interest, such license it seems may be revoked at any time; though if there be a sufficient grant of trees and a license to go and take them, then there is such an interest accompanying the grant that the grantor would probably be estopped from denying the license." I am not certain that I distinctly apprehend the learned Chief Justice's meaning. It seems to me that a sufficient grant of trees standing or being on certain land carries with it, of necessity, the right to the grantee to enter the land and cut and remove the trees; and that must continue as long as the necessity for it exists; and that an expressed leave and license coupled with, and necessary to the enjoyment of, a valid interest, cannot be revoked at pleasure. In this case, however, there is no question as to the validity of the sale under the Statute of Frauds, nor as regards a lien for unpaid purchase money. Here there is a valid and sufficient contract of sale under seal, coupled with leave and license, expressed in the same instrument, to the purchasers to enter on the land and cut and remove the timber until the 4th of April, 1884.

Thus, there was coupled with an interest, leave and license affirmatively given during a prescribed time; and there was an implied covenant by the purchasers to cut and remove the timber in that time. Could that leave and license be revoked after that term had expired? I apprehend it could not, unless the purchaser's right to the timber ceased, and the property in the timber reverted to the vendor. Did it so revert? If the property passed to the purchasers immediately upon the completion of the sale and purchase, I think it could not, under the terms of the instrument and the circumstances of the case, revert. The instru-

ment contains no negative terms to have any such effect. The transfer of the property is absolute: there are no words of limitation, no words to divest the vendors of the property at any time, no words of reversion.

But, at least, it is argued, the leave and license contained in the instrument for a specified time terminated, and the defendants were trespassers in removing the timber after the 4th of April, 1884.

I apprehend that the leave and license did not then terminate; at least, I seriously doubt that it did.

It is expressed in affirmative terms only; and it is coupled with an interest, and could not, it seems to me, be revoked, while it was necessary to the enjoyment of the interest which remained.

But, at all events, while the property remained there, the owners would have the right to take it away, and of necessity a right of ingress and egress on the land. The plaintiff may have the remedy suggested by Mr. Justice Galt at the latter end of his judgment in *McGregor v. McNeill*, and I presume there are other remedies open to him, in a case of an attempt to extend the time unreasonably.

Regarding this case with reference to its own circumstances only, it appears to me peculiarly a case to which the doctrine of an immediate transfer of the property in the timber would apply.

All the circumstances shew that the parties dealt as for goods, as nearly as the nature of the property permitted. There was no notion, no intention of giving or taking an interest in land. It was a sale of pine timber to timber merchants who owned a saw mill and were in the business of manufacturing and selling sawn lumber; and in the instrument what is sold is expressed to be all the merchantable pine suitable for their (the vendees') purposes. The vendor retained possession of this land and had the right to clear off and cultivate it. He was merely under obligation, when, in clearing the land, he cut any pine, the vendees' timber, to skid it, so that it might be con-

veniently removed. The plaintiff's land was to be, as it were, a store house for the vendees' timber until they wanted to saw it, and as it was convenient to the mill they took from that place only occasionally when short of a supply of logs from elsewhere.

The plaintiff says he sues for the pine timber removed by the defendants, part of which had been cut by them before, and another part of which had been cut by the plaintiff himself after the 4th of April, 1884.

The defendants were, in my view of the case, the owners of the timber ; but the plaintiff had a right to cut it down, and cut it into logs, and he was bound to skid the logs, for which he was entitled to demand payment from the defendants. He did not, however, skid the logs, but he severed the trees from the soil, and the defendants took them. I am not disposed to think it material, but the fact is, and it may as well be distinctly noted, that the timber, which was removed by the defendants, or one of them, after the time limited, had been severed from the soil by them, or one of them, before that time, or by the plaintiff, and not by either defendant, afterwards.

Hitherto I have made no distinction between the two defendants ; but there was no evidence connecting the defendant Shortreed with the taking of the timber complained of, and as against him the action was dismissed, without costs.

Judgment was ordered to be entered against the defendant John Barr, for \$150, with full costs ; that is to say, for \$125 damages in respect of the logs taken, and \$25 for damages done by the fire set out by the defendant John Barr, which spread to and overran a part of the plaintiff's land, and did him some damage.

This last item of the judgment is not moved against. The motion is to set aside the judgment, so far as relates to the item of \$125 damages, in respect to the logs or timber, and to enter judgment for the defendant Barr with costs.

I think the motion should be allowed and the judgment set aside, so far as relates to the \$125 damages, but without costs either of the action or of this motion.

I think the defendant Barr asserted his right to the timber harshly in act and language, and so probably provoked the bringing of this action: the law, too, is not without doubt. All things considered, I think the defendant should not have costs.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

MASTERS V. THRELKELD.

*Covenant not to dispose of business—Transfer by firm to covenantor.—
Proviso for acceleration of time for payment.*

Where there was a covenant by defendant that one half of the surplus proceeds of goods, transferred by the plaintiff to the defendant after deduction of liabilities, should be paid to the plaintiff by the defendant by his promissory note at two years, with a proviso that should the defendant or the firm of T. & S., of which the defendant was a member, dispose of their business, or make an assignment for the benefit of creditors, the note should become due, and S. subsequently retired from the business and transferred to the defendant all his interest therein,

Held, that the transfer by S. to T. was not a breach of the covenant, and that the time of payment of the note was not thereby accelerated.

THE plaintiff, who had theretofore carried on business as "A. J. Masters & Co.," transferred to the defendant, by an instrument dated December 1, 1885, for the consideration therein mentioned, all and singular the stock-in-trade, machinery and all assets of A. J. Masters & Co., and this action was brought upon a covenant therein contained on the defendant's part, that on the 1st January, 1886, the said stock-in-trade and assets of the firm of A. J. Masters & Co. should be taken at a fair valuation, and the surplus arising, after deducting all liabilities of whatever nature in connection with said business, for or on account of which the defendant was or might be liable to any person

or persons, whether as surety or otherwise, should be ascertained, and one half of such surplus should be paid to the plaintiff by the defendant by his promissory note therefor, at two years from the said first day of January, 1886, without interest; provided, however, that should the defendant, or the firm of Threlkeld & Smith, of which said defendant was a member, dispose of their business, or make an assignment for the benefit of creditors within said time, then the said promissory note should at once become due and payable.

On the said first day of December, 1885, the defendant and one Joseph Neil Smith executed articles of co-partnership and thereby became partners under the name of Threlkeld & Smith, and it was thereby agreed that whatever surplus there might be coming to the defendant from the assets of the business of A. J. Masters & Co. should be brought into the business of the co-partnership and remain in said business to the credit of the defendant as capital stock.

On the said first day of December, 1885, by an agreement then executed, the firm of Threlkeld & Smith employed the plaintiff as manager of the manufacturing department of their business.

On the fifth day of March, 1886, by a memorandum, endorsed upon the said articles of co-partnership under the hands and seals of the defendant and Smith, their partnership was dissolved, Smith retiring and transferring to the defendant all his interest in the assets, rights, and good will of the business, the defendant continuing the business and assuming the liabilities of the firm and undertaking to protect Smith therefrom, and each mutually releasing the other from all demands.

The cause was tried before Cameron, C. J., and a jury, at the last fall sittings of this Court at Toronto.

At the close of the charge Mr. Browning, counsel for the plaintiff, submitted that the learned Chief Justice should have told the jury that the plaintiff was entitled to the amount of what they might find him entitled to in respect.

of the surplus, and not merely to a note for it, upon the ground that the retirement of Smith from the firm of Threlkeld & Smith and the transfer by him to Threlkeld of his interest therein were a disposal of the business, so as to accelerate the payment under the terms of the covenant sued on. This the learned Chief Justice declined to do.

The jury found that the plaintiff was entitled to the promissory note of the defendant for the sum \$376.50, payable in two years from the first of January, 1886, under the terms of the covenant sued on, and the learned Chief Justice thereupon directed that the defendant should make and deliver to the plaintiff his promissory note payable on the first day of January, 1888, for the said sum of \$376.50, with costs of suit to be taxed on the scale of costs in the High Court of Justice.

November 27, 1886. *Browning* moved for an order directing judgment to be entered herein for \$376.50, instead of a note for that amount, on the ground that the dissolution of the partnership of Threlkeld & Smith, and the transfer of their business to Threlkeld, individually, were a sufficient disposal of said business, within the terms of the covenant sued on to entitle the plaintiff to immediate judgment for the amount of the note.

George Bell, shewed cause.

Browning, contra.

December 23, 1886. ARMOUR, J.—In *Varley v. Coppard*, L. R. 7 C. P. 505, A. and B., partners in trade, were assignees of a lease which contained a covenant by the lessee for himself and his assigns, that he would not, neither should his executors, administrators, or assigns assign the demised premises without the consent in writing of the lessor. On the dissolution of the partnership A. assigned all his interest in the premises to B., and this was held to be a breach of the covenant.

In *The Corporation of Bristol v. Westcott*, 12 Ch. D. 461, a lease was granted to B. and H., co-partners in

business, of certain property, to hold the same unto the said B. and H., their executors, administrators, and assigns; and by the lease they covenanted for themselves, their heirs, executors, administrators, and assigns, and each of them for himself, his heirs, executors, administrators, and assigns, with the lessor, her heirs and assigns, that the said B. and H., their executors, administrators, or assigns, or any or either of them, would not, during the term, assign, underlet, or part with the possession of the demised premises, or any part thereof, to any person or persons without the written consent of the lessor, her heirs and assigns; and there was a proviso for re-entry for breach of any of the covenants. B. and H. agreed by a memorandum in writing to dissolve partnership, and signed another memorandum, by which it was agreed that a proper deed of dissolution should be prepared, which deed should contain an assignment by the said H. to the said B. of all his estate and interest in the partnership property and effects, and, either by the same or a separate deed, of all his estate and interest in any leasehold premises in which the said partnership business was carried on with the consent of the lessor of the said premises, if such consent could be obtained. H. signed a third memorandum, reciting that he had given sole possession of the leasehold premises to B. The partnership was accordingly dissolved and B. remained in sole possession of the leasehold property, but H. did not execute any assignment of his interest therein to B., nor was the lessor's consent applied for. Bacon, V. C., said: "There has been no parting with the possession. For one partner to withdraw does not alter the legal rights of the lessor. The remaining partner was from the first in full possession, and he only continues so."

Upon the argument in the Court of Appeal, Jessel, Master of the Rolls, said with reference to *Varley v. Coppard*: "I do not know that I should have decided even that case in the same way, for the deed was not in point of law an assignment, but a release. But you have to rely on the words, 'part with the possession,' and how can possession be parted with to a person who already has it?"

In giving judgment, Jessel, Master of the Rolls, said: "Now we come to deal with the words, 'part with the possession of the demised premises to any person or persons.' What do the words 'any person or persons' mean? Do they not mean 'any other person or persons?' Of course, if the demise had been to one person, the words would have had that meaning, and the question is whether, where the demise is to several persons, the words have not the same meaning; whether in fact what was intended was not this, that the lessees were not to let into possession any one not previously approved as tenant by the lessor. Giving the words that meaning you make the covenant sensible and I think that is their fair meaning."

Brett, L. J., said: "It seems to me, upon the construction of this covenant, that parting with possession to any person means to any person other than one of those two to whom possession was given by the original lease;" and Cotton, L. J., said: "I agree that although it is a question of forfeiture we must construe the covenant fairly, ascertain its meaning without regard to forfeiture, and then see whether upon that ascertained meaning a forfeiture has been incurred. But when we look at the words of this covenant with regard to the circumstances of the case when it was entered into, I think its proper construction is, that the lessees are not to give possession to any one who has not already been admitted as tenant or approved as a tenant by the lessor."

Different considerations are of course applicable to such covenants in a lease as were treated of in these two cases from those applicable to the provision under discussion; but applying the reasoning in the latter case to the provision in question, it shews that a disposal by Smith to Threlkeld is not within the provision; that a disposal to be within the provision, must be a disposal by Threlkeld & Smith to some other person or persons.

But I think it becomes clear that a disposal by Smith to Threlkeld is not within the provision, when we con-

sider the circumstances under which this provision was made, and the terms of this provision.

The three agreements of the first of December, that Threlkeld was to buy the assets of A. J. Masters & Co., that Threlkeld and Smith were to form a partnership, the surplus arising from these assets being brought into it, and that Masters was to be employed as manager—were all parts of one entire arrangement, and were all executed simultaneously, so that at the time this provision was made the partnership of Threlkeld & Smith was formed, and was treated in the provision as having been formed.

We then have this provision providing for the event of a disposal by Threlkeld, one of the partners, and by the firm, and not providing for the event of a disposal by Smith, the other partner. Does not this clearly indicate that a disposal by Smith was not intended to be within the provision? I think it does.

In my opinion the motion should be dismissed, with costs.

WILSON, C. J., and O'CONNOR, J., concurred.

Motion dismissed, with costs.

[CHANCERY DIVISION.]

THOMPSON ET AL V. GORE ET AL.

Fraudulent conveyance—Marriage settlement—Consideration for—Voluntary act—Fraud on creditors.

In an action brought by T. K. & Co., on behalf of themselves and all other creditors of J. G. against J. G., his wife, and the trustee, to set aside a marriage settlement by which J. G., a day or two before his marriage had settled the greater portion of his property on his wife, in which it was shewn that he and his wife before the marriage were living on the most intimate terms short of the intimacy of husband and wife, and that she would have accepted a proposal of marriage without hesitation without any condition as to a marriage settlement, and that he was in insolvent circumstances, of which fact she must have been aware, and that the settlement was purely voluntary on his part, and that she knew nothing of it until she was asked to sign the deed.

Held, that the settlement was not the consideration, or part of the consideration of the marriage, and that it must be set aside as fraudulent and void against creditors : *Commercial Bank v. Cooke*, 9 Gr. 524 and *Columbine v. Penhall*, 1 Sm. & G. 228 referred to and followed ; *Fraser v. Thompson*, 1 Gif. 49, distinguished.

THIS was an action by the firm of Messrs. Thompson, Codville & Co., on behalf of themselves and all the other creditors of one James Gore, against the said James Gore, Jane Gore, his wife, and John K. Brydon, to set aside a marriage settlement made by the said James Gore of the greater part of his property on the said Jane Gore at the time of their marriage, in which marriage settlement the defendant, John K. Brydon, was the trustee.

The plaintiffs' statement of claim set out that the defendant, James Gore, was largely indebted, and was aware that he was in insolvent circumstances and had made the settlement as a voluntary act, and it was no part of the consideration for the marriage, and that defendant, Jane Gore, was aware of his circumstances and his fraudulent intent.

The statement of defence of James Gore, alleged that the marriage was the consideration for the settlement, and it was made in pursuance of an ante-nuptial agreement, and not for the purpose of delaying or defeating creditors.

The defendant, Jane Gore, set up the same defence, and alleged a further consideration of \$1,200 owing by James Gore to her before marriage; and that the settlement was given to her at her request, and upon her demand when she insisted on having same, and without fraud, or notice, or knowledge of fraud on her part.

The defendant, John K. Brydon, denied all fraud and alleged that he claimed no estate in the settled property, except as trustee, and submitted to act as the Court should direct.

The material facts and circumstances are fully set out in the judgment.

The action was tried at Port Arthur, on July 12th and 13th, 1886, before O'Connor, J.

G. T. Blackstock and *T. P. Galt*, appeared for the plaintiffs.

Lash, Q. C., appeared for defendant, Jane Gore.

Falconbridge, Q. C., for the other defendants.

September 2, 1886. O'CONNOR, J.—This action is brought by the plaintiffs, as creditors of the defendant, James Gore, on behalf of themselves and other creditors, and seeks to have a deed of conveyance, dated the 21st day of October, 1884—a marriage settlement—declared fraudulent and void as against the creditors of the defendant, James Gore. By this deed, the defendant James Gore, prior and preparatory to his intermarriage with the defendant Jane Gore, then Jane Hedley, conveyed all his real property and the greater part of his personalty, and two thousand dollars of money, to the defendant Brydon, in trust (it may be briefly stated) for the use and benefit of the defendant Jane Gore, and of the issue, should there be issue, of the marriage.

The defendant, James Gore was then, and he had been for some time before, engaged in business at Rat Portage, in the district of Thunder Bay, carrying on the business of an hotel keeper—and, at a different place in the town,

a grocery and liquor store. At the time of the date of the marriage settlement, he was indebted to several parties for goods, to an amount in the aggregate of about \$14,000, and his assets, including real estate, were estimated at from \$25,000 to \$30,000. He was, and had been for several months before, greatly embarrassed by demands of creditors, which he was unable to meet; so much so that the wages of servants in the hotel had been running on, unpaid, for the whole or greater part of a year, until they amounted to about \$3,000; and during much of that time the servants were urgent and clamorous in their demands for payment.

Miss Hedley, now Mrs. Gore, went to the hotel in May of 1883, and remained there until some time in January, 1884. She then went home to her mother, who resides near St. Mary's, in the county of Perth. James Gore accompanied her to the east; he returned to Rat Portage, in answer to a request made by his then manager, in relation to business matters. Miss Hedley remained at her mother's place, keeping up a correspondence with the defendant James Gore; that correspondence, according to her evidence, has been destroyed. The precise time at which Gore proposed marriage to Miss Hedley does not distinctly appear, even by her own evidence; she says she thinks it was in July, 1883, about six weeks or two months after she went to Rat Portage on a visit, and was staying at the hotel belonging to James Gore; nor does it appear distinctly at what precise time he told her that he would settle property on her, by way of a marriage settlement.

In July, 1884, Miss Hedley returned to Rat Portage, on the receipt of a telegraph message from James Gore, asking her to return to Rat Portage. She says she expected the marriage to take place immediately after her return from St. Mary's, in July, 1884, but in fact it did not take place until the 21st or 22nd of October, after the execution of the marriage settlement.

In order to apply the cases to which I shall hereafter refer, it is necessary to consider carefully, even critically, what Miss Hedley's exact position was in relation to the

defendant, James Gore, prior to their marriage, but especially from the time she went to Rat Portage and became an inmate of Gore's hotel there, in May, 1883, until she left in January, 1884, and again from the time of her return thither, until the marriage. Whether she occupied more than one room in the hotel, or not, does not appear in evidence as I recollect it; but it is rather, I think, to be inferred from the evidence that one room answered her for bedroom and parlour. The evidence shews that she and James Gore were on the most intimate terms, short of that intimacy which, as between a man and a woman, is commonly understood by the term "cohabitation." Such an intimacy in what was, to her at least, a strange place, unaccompanied by any relative, male or female, may be partially accounted for and excused by the fact that she and Gore had lived in the same neighborhood before he went to Rat Portage, and had been acquainted from her early years. During the time she was in the hotel, Gore spent at least his leisure time during the day in her room—a fact so well known in the house that, when the manager or other servants desired to see or consult him about any matter relating to the affairs of the house, or the business, he or they went directly to that room, spoke to him and received his instructions there, and in the presence of Miss Hedley.

It can hardly be doubted that Miss Hedley expected to become the wife of James Gore at that time, and that an offer of marriage would be unhesitatingly, and one feels inclined to say joyfully, accepted at any moment, without even the thought of a marriage settlement; otherwise Miss Hedley by her sojourn at Rat Portage, and the manner of it, placed herself in an unenviable predicament, and much at the mercy of Mr. Gore. Her speedy return from the roof of her mother to the hotel of James Gore, in response to a mere telegraph message, shews that she was at his disposal in the honourable way of marriage, without the offer of any extraneous inducement or consideration, such as a marriage settlement.

Mrs. Gore, in her evidence at the trial, did not say that the marriage settlement was the consideration in the whole or in part, for the marriage, or that she was thereby in any way influenced to consent to the marriage. She spoke of it as if Gore had mentioned to her before the marriage that he was going to settle certain properties, which he indicated, in that way, not as a consideration for the marriage but as a voluntary act of his own mere motion. Then the deed was prepared, upon the instructions of James Gore, by his own solicitor, whom he also chooses as the trustee of the settlement. In fact she knew nothing of the deed until she was asked to sign it, and even of that fact she had not a clear recollection. Indeed she was but a passive instrument in the whole affair; she was, as she said, innocently drawn into it. There is, I think, little if any room to doubt that what she felt most concerned in, was not the marriage settlement, but the marriage ceremony.

From the facts in evidence, it is nearly impossible to arrive at any other conclusion than that the marriage settlement was the voluntary act and deed of James Gore; and, though done before the marriage was solemnized and preparatory thereto, was collateral, and was not the consideration or part of the consideration of the marriage.

The marriage was, in my opinion, but the occasion used by James Gore to defraud his creditors by means of the marriage settlement, to which the fact of marriage gave colour. Mrs. Gore was asked, in the course of her examination at the trial, to say whether she would not have married James Gore at the time without a marriage settlement; she replied with great hesitation, and in an undertone, that she did not know what she would have done, and on being further pressed she declined to say; nor would she say that her consent to the marriage was induced by the promise or expectation of the marriage settlement.

Neither of the defendants, James Gore, nor Brydon, appeared at the trial, although Brydon was called upon notice to appear and give evidence on behalf of the plain-

tiffs: it was said, however, that no conduct money had been paid him. But it seems strange that persons who are distinctly charged with fraud should hesitate, if untruly charged, to appear and give evidence which might relieve them of the imputation. Their conduct in staying away ought not, however, to operate to the prejudice of Mrs. Gore, only in so far as her position is so completely identified with their positions in the transaction that they cannot be separated without destroying the consideration of the mutual acts and relations of all the parties connected with the marriage settlement, regarded as one concrete matter. Considered in that way, their absence, under the circumstances, tends to confirm the conclusion to which the evidence leads—that is to a high degree of probability—that the marriage settlement was concocted between James Gore and the solicitor as a mere device, having no necessary but a merely accidental connection with the marriage. This view accords also with the fact that James Gore was at the time under pressure of an impending crash in his affairs. He was not of business habits, and it is evident that he pushed on through business recklessly: and until told by a new book-keeper some time in June, 1884, he did not know the extent of his indebtedness—when, instead of \$4,000 as he thought, it amounted to about \$14,000, falling due at short dates. Why he did not apply to his creditors for an extension of time does not appear. Had he deceived them? Or was he afraid, although his property was nominally of value about double the amount of his indebtedness, that the creditors would come down on him together, and the property would be torn asunder, would be sacrificed, as often is the case? In this quandary he seems to have, partly at least, lost his head, and with the aid of his solicitor he concluded to resort to the marriage settlement.

Then Miss Hedley was telegraphed for. At first the marriage was to take place in July, but it was put off; and she occupied the same dubious position which she had before occupied, until the 21st or 22nd of October, 1884.

The cause of delay does not appear. Had James Gore or Brydon been examined as witnesses it might have been drawn out. Were they, without Miss Hedley's knowledge, trying the temper of the creditors with a view to an arrangement; or were they in doubt about the efficacy of the proposed marriage settlement, and therefore endeavouring to devise some other scheme in lieu thereof? If either had succeeded, would the marriage have taken place?

Mrs. Gore denied, though in a rather faint way, that she knew of James Gore's embarrassed circumstances during the time she was at Rat Portage. But I think her evidence in that respect must be received with reservation and caution; and she gave it in that way. She probably did not know of it to its full extent; and it is equally probable that James Gore did not wish that she should know to that extent. It is, however, incredible that she could be so long in the hotel, occupying almost the position of the mistress of the house, where the servants, ten or a dozen, were almost in a state of rebellion, loud and incessant in their demands for wages, many months in arrear, without hearing of the trouble and the cause of it; without hearing the complaints and observing something of the results thereof. The state of affairs in this respect, as described by the manager and others in the house, precludes the notion that Miss Hedley could be ignorant of Gore's embarrassments.

Then, there is the fact, sworn to by David Morrison, who was manager of the hotel part of the time, that demand was made by some of the servants for their back wages in the presence and hearing of Miss Hedley, and that the embarrassments were discussed between him and James Gore, likewise in her presence and hearing. Besides that, she gave James Gore \$700, belonging to her mother to be kept in the safe until an opportunity should occur to invest it advantageously for her mother: but, contrary to that trust, Gore used the money for his own purposes. She also lent him two other sums of money, amounting altogether to from \$1,200 to \$1,500. These facts were in

themselves, sufficient, besides the curious transaction respecting the liquor store and lot mentioned hereafter, to give her a clear enough intimation of James Gore's circumstances. But, be this as it may, there is no doubt whatever that the defendant Brydon knew all the circumstances, and was in fact a contriving party to the intended fraud on the creditors, and he was the solicitor for Mrs. Gore as well as for James Gore in the transaction: he was also accepted by her as her trustee.

This was held sufficient to fix the *cestui que trust* with knowledge in *The Commercial Bank of Canada v. Cooke*, 9 Gr. 524, at pp. 536-7, a case which is, in other respects, not unlike this case. In that case, Donaghue, the settlor, said that his object was to secure his property for his children, that it should not be sacrificed for his debts.

Gore said at one time he would make a settlement of his property on his intended wife, so that she would be all right in case his creditors came down; that he had consulted Mr. Brydon about it, and that he said it would stand. J. W. Humble, his book-keeper, expressed a doubt on that point, namely, that the settlement would stand, and at his request Gore authorized him to take the advice of Mr. Robinson, another solicitor. Humble did consult Robinson, who advised against the settlement. Humble informed Gore of Robinson's advice. Gore, however, said he preferred Brydon's advice. At other times, Gore said his creditors might go to——perdition.

In the *Commercial Bank v. Cooke*, 9 Gr. 524, the settlement was declared void as against the creditors of the settlor; and, in point of principle, I do not think this case can be distinguished from that one.

In *Columbine v. Penhall*, 1 Sm. & G., 228, says the Vice-Chancellor, in *Fraser v. Thompson*, 1 Gif., at page 64, the settlement was set aside on the ground that the marriage was not contracted *bonâ fide*, but was a mere contrivance to remove from the reach of creditors the property enjoyed during an illicit cohabitation which had existed for years. The marriage was a mere fraudulent device,

resorted to for the purpose of the settlement, and for the purpose not of giving, but of retaining the means of comfortable cohabitation in fraud of the creditors. I do not understand the Vice-Chancellor's terminology, when he says, "the marriage was not contracted *bonâ fide*." I do not see why a marriage between persons who have cohabited as stated may not be *bonâ fide*. Many such marriages have taken place under circumstances which left no doubt that the marriage *per se* was *bonâ fide*, perfectly honest.

The real question, as it appears to me, is this, was the marriage settlement the consideration, or partly the consideration, which induced the wife to consent to the marriage, and thereby to change her state and position in society? If the settlement was not wholly or partly the consideration which influenced the wife, and induced her to consent to the marriage, how can it be said that the marriage or the wife's assent thereto was the consideration or a consideration, for the settlement? There must be mutuality of consideration. If the settlement is a collateral matter, which did not enter into the negotiations for the marriage, but was voluntarily made by the husband as an act of good will or mere benevolence, it cannot, I think, be supported as against creditors, whose claims existed at the time, on the ground that the marriage was the consideration.

Regarded in this light, it might well be doubted, and require but slight evidence to convince a reasonable mind, that in *Columbine v. Penhall*, *supra*, the woman in question required no such inducement as that suggested by the offer of a marriage settlement, to procure her consent to the marriage. It may be presumed that her circumstances rendered her but too ready to change the character of mistress for that of wife; and it may be further presumed that the involved and embarrassed debtor assumed, or proposed to assume, the character of husband for the purpose of making the marriage the occasion of settling his property so that he might retain the property and enjoy it in fraud of his creditors.

The settlement involved in *Fraser v. Thompson* was not set aside. But in that case the settlement was mutual—that is, the settlement included property of the wife as well as property of the husband, the settlement of the property of one of them being part of the consideration for the settlement of the property of the other, and the Vice-Chancellor held that, “if the husband’s property was restored to his creditors, it was impossible to restore to the wife that state of enjoyment of her property which she had before the marriage.” By the settlement, said he, of her property, and by the marriage, she parted with the absolute dominion of her own property and person on the faith of the settlement of the husband’s property. “But,” he adds, p. 63, “the difficulty extends beyond the effect of the settlement of the wife’s property included in it. All the unsettled personal property of the wife which may accrue to her during the marriage, becomes by the marriage the property of her husband and his creditors. If the husband’s settled property should be decreed to be restored to his creditors there can be no restitution to the wife of her unsettled property, and she must lose it, as well as these rights under the settlement in consideration of which she parted with her own.”

These considerations, which appear to have strongly influenced the mind of the Vice-Chancellor, are, however, wanting in this case. Here there is no mutual settlement of property; only the husband’s property was included in the settlement. And the law, which formerly gave the husband the control of the wife’s unsettled property, that is, made it his property and that of his creditors, has been since completely changed, so that the wife’s unsettled property, whether it accrued to her before or during the marriage, is and remains her own, free from any claim of the husband, or of his creditors, by reason of the marriage. And, in my opinion, this change of the law has considerably detracted from the very high, the superlative value formerly set on marriage as a consideration for a marriage settlement. Indeed, I think it may be said that the mar-

riage settlement, and the pre-eminent value attributed, and very properly attributed, to marriage as a consideration for the settlement, had their origin in the former state of the law which made the husband owner of the wife's unsettled personal property, and gave him control during the coverture of the wife's unsettled real property, and if he survived the wife and issue were born alive, control of such realty after the wife's death and during his life.

The reasons stated as the grounds of judgment in *Columbine v. Penhall*, 1 Sm. & G., 228—but at page 270—are not precisely what is said of them, by the Vice-Chancellor Stuart, in *Fraser v. Thompson*. They are as follows :

“ But where the rights of existing creditors are directly interfered with by such an arrangement, and property to which those creditors might resort is removed from their reach, a more severe rule must be applied. And if such circumstances of suspicion as occur here, from the embarrassed circumstances of the grantor, the pressure of creditors and the appearance of a voluntary arrangement, originating in the necessity and fear induced by this pressure, the case is carried beyond the principle which sanctions and supports a deed as a mere family arrangement, and not an actual valuable consideration.”

This language of the judgment itself places the *ratio decidendi* on a ground very different from that assumed by the Vice-Chancellor. And the same language may be applied to this case, for the circumstances enumerated exist herein.

But the decision of the Vice-Chancellor, in *Fraser v. Thompson*, cannot be regarded as an authority in the present case, inasmuch as his decree was reversed on appeal before the Lord Chancellor, Lord Campbell and the Lord's Justices. It is true they reversed the decree on the ground, that at least one act of bankruptcy had been committed by Gardner, the settlor, with the knowledge of the intended wife, before the settlement was made, and within twelve months before the adjudication in bankruptcy ; but

the Court expressed no opinion on the other matters involved in the case, save only in concurring with the Vice-Chancellor as to the high value of the marriage consideration. Lord Justice Knight Bruce, referring to the bankruptcy, said: "On this ground I think that the settlement cannot stand. But I wish it to be particularly understood that I do not give any opinion upon the case apart from this point." The case in appeal, is reported in 4 D. G. & J., 659.

Of course, as we have no Bankrupt Act, the point of final adjudication in that case does not occur in and has no application as a ground of decision to this case.

If this case, as developed by the evidence, does not fall within the mischief intended to be prevented by the statute 13 Eliz. ch. 5, it is, I think, extremely difficult, if not almost impossible, to imagine a case involving the validity of a marriage settlement which does fall within the statute, however strongly the evidence may point to the settlement as merely pretended and colourable, and as resorted to for the purpose of defrauding creditors.

I may remark, in conclusion, that Mrs. Gore's memory appeared in many particulars sadly at fault. For instance, she had quite forgotten the transaction relative to the grocery and liquor store, and lot of land, sworn to be worth \$7,000 or \$8,000, and which had been conveyed to her by James Gore before marriage, in consideration of \$1,000, for the payment of which he took her promissory note. But, when pressed about this, she did remember having seen the deed of conveyance; she found it accidentally in a trunk to which she and her husband had recourse after marriage. Nor did she seem to know that, on the sale of the stock of groceries and liquors in that store to the book-keeper, on the 8th of January, 1885, for a sum of over \$4,000, notes for more than half the amount had been made payable to her as part of the transaction.

Judgment will be for the plaintiffs; and, following *The Commercial Bank v. Cooke*, with costs against the defendant James Gore to be paid out of the settled estate.

THIS action subsequently came on by way of appeal to the Divisional Court, and was argued on December 2nd and 3rd before Boyd, C., and Proudfoot, J.

Lount, Q. C., and *Marsh* for the defendant Jane Gore. The evidence shews that the judgment below proceeded more upon suspicion than facts. The terms of the settlement were settled before the marriage, and before the wife had any notice that the husband was insolvent or embarrassed. To set the settlement aside it must be shewn that the wife was a party to the scheme: *Campion v. Cotton*, 17 Ves. 263a; *Columbine v. Penhall*, 1 Sm. & G. 228. The settlement should be supported: *Fraser v. Thompson*, 4 DeG. & J. 661; *Mulholland v. Williamson*, 12 Gr. 91, in app. 14 Gr. 291. It must be shewn that the fraudulent intent was joined in by both husband and wife. The trustee Brydon concocted the whole matter, and he would not tell his *cestui que trust*, the wife, so she could not be held to have constructive notice through him. Notice to a trustee to affect the *cestui que trust* must be given during the trusteeship. Even if actual notice is given to a trustee before the trusteeship and it is his duty not to tell the *cestui que trust*, no notice will be implied. See also *Warrick v. Warrick*, 3 Atk. 294; *Worsley v. Earl of Scarborough*, 3 Atk. 392; *Fuller v. Benett*, 2 Ha. 402 to 405, and cases there collected; *LeNeve v. LeNeve*, 2 W. & T. L. Cas., 4th Am. ed. 169, 170; *Commissioners of Johnson Co. v. Thayer*, 94 U. S. R. 631 at 644-5. Imputed constructive notice may be rebutted by the circumstances surrounding a case: *Kennedy v. Green*, 3 My. & K. 719; *Thompson v. Cartwright*, 33 Beav. 185; *Kettlewell v. Watson*, 21 Ch. D. 707; *Waldy v. Gray*, L. R. 20 Eq. 251-2; *Cameron v. Hutchinson*, 16 Gr. 533; *Monro v. Rudd*, 20 Gr. 61; *Sharpe v. Foy*, L. R. 4 Ch. 36; *The Commercial Bank v. Cooke*, 9 Gr. 524. Brydon was not solicitor for Miss Hedley. She even stipulated that she should have the right to remove him as trustee: *Perry v. Holl*, 2 DeG. F. & J. 38, 53; *Weidler v. The Farmer's*

Bank of Lancaster, 11 Sergt. & R. 139; *Stearns v. Gage*, 79 N. Y. 102, 108; *Farley v. Carpenter*, 27 Hun. 359.

Falconbridge, Q.C., for James Gore and Brydon. The onus of shewing that the settlement was fraudulent lies on the creditors: *Richardson v. Horton*, 7 Jur. 1144. As for marriage itself, the marriage of persons formerly in loose cohabitation furnishes good consideration: *Schouler* on Husband and Wife, s. 349; *Bulmer v. Hunter*, is cited in *Everslie* on Domestic Relations, 172. See also *Prewitt v. Wilson*, 103 U. S. R. 22.

G. T. Blackstock and *T. P. Galt*, for the plaintiffs. The evidence shews that Gore was pressed on all hands for money and could not get it, and that Miss Hedley was aware not only of his impecunious state but that by the settlement she was getting all his property. The judgment below was fully justified by the facts. The wife must be connected with the fraud to make the settlement invalid. If the amount of the property settled is extravagant or grossly out of proportion to the station and circumstances of the husband that would be notice of the fraud: *Bump* on Fraudulent Conveyances, 3rd ed. 300; *Croft v. Arthur*. 3 D. Eq. R., (S. Car.) 231. In *Campion v. Cotton*, *supra*, it was conceded in argument that a case might be made out in which the settlement would be set aside. *Fraser v. Thompson*, cited *supra*, by our learned friends was afterwards reversed. We refer to *Ex p. McBurnie*, 1 DeG. M. & G. 446; *Dewey v. Bayntun*, 6 East 267. A marriage settlement in this country should not be considered in the same way as those referred to in English cases where settlements are the rule and not the exception like they are here. As to notice we refer to *Hargreaves v. Rothwell*, 1 Keen 154; *Rolland v. Hart*, 40 L. J. Chy. 701; *The Real Estate Investment Co. v. The Metropolitan Building Society*, 3 O. R. 476. As to retainer of solicitor: *Fisher* on Mortgages, 4th ed. 529, and cases there collected, note S.

Lount, Q.C., in reply, *Cooke v. The Commercial Bank*, *supra*, is directly in point in our favour.

December 6th, 1886. BOYD, C.—I agree in the result of Mr. Justice O'Connor's judgment that the settlement cannot stand. I am not disposed to attach value to the wife's denials of her knowledge of the financial condition of her husband, in which she contradicts three or four witnesses for the plaintiff. It is proved that she was living in the hotel in daily familiar communication with the defendant, her future husband, and that she "assisted" in conversations when the difficulties of raising money and meeting claims were discussed from time to time between her intended husband and his managing men. She was present when one of the servants in a public way demanded \$100 on account of her back wages, which the defendant Gore was unable to pay, and she knew that the wages generally of all the servants in the hotel were in arrear. She knew that the hotel business was a new thing begun in the spring of 1883, and that the grocery development of the liquor business was also a new thing begun in the summer of 1884. She knew, therefore, that he was extending his business and was not able to meet the liabilities as they were periodically falling due. She knew that he proposed to settle what was practically and substantially the whole of his available means on her,—property, worth \$25,000, leaving only in his hands the stock in trade, the worth of which at the outside was not over \$2,000, a residue which was actually not sufficient to pay the overdue wages of the hotel servants. She therefore knew that the inevitable result of the intended settlement was to deprive the creditors of any chance of getting paid. She was, to my mind, clearly implicated in the design and intent of the husband and her trustee and solicitor Brydon, which was beyond controversy—a most audacious attempt to defraud the creditors. The two elements concur which were referred to in *Ex p. McBurnie*, 1 DeG. M. & G. 446, *i.e.*, the intended wife is satisfactorily proved to have been implicated in the fraudulent design of her intended husband, and the settlement was in its terms and scope grossly out of proportion to the station and circumstances of the

husband. See also *Parnell v. Stedman*, 1 Ca. & Ell. 153.

I think the judgment should be affirmed, with costs.

PROUDFOOT, J.—It was scarcely disputed by the counsel for the wife, Mrs. Gore, the person principally interested, that Gore had entered into a scheme with Brydon, who acted as a solicitor, to put his property in such a position that his creditors could not reach it; but they contended that Mrs. Gore, then Miss Hedley, was not aware of Gore's difficulties, and was not affected by Brydon's knowledge of or complicity in the arrangement.

I have carefully read over the evidence and do not think it will be necessary to consider the question, so well argued by Mr. Marsh, whether Mrs. Gore is to be affected by constructive knowledge or not, for I think the proper conclusion to be drawn from the evidence is that she did know that Gore was pressed for money; that creditors made frequent applications for payment which were not complied with; that she knew the property possessed by Gore, and assented to an arrangement by which the whole was settled upon herself; and that by such means Gore was placed in such a position as to be unable to pay his creditors.

It appears that early in 1884 the liabilities were ascertained to be about \$17,000, and the property he owned was valued about the same time at from \$20,000 to \$25,000, enough apparently to have paid his creditors; but by the operation of this settlement the property was all withdrawn from them, and not a dollar left to satisfy them.

In determining the effect of the evidence we must recollect that when a fraud is intended it is not likely that direct proof can be obtained of it. The circumstances of the parties, and all the facts connected with the transaction are to be taken into consideration, and if these are such as would justify a jury, or a Judge, in coming to the conclusion that a fraud was intended, and that the consequence of a fraud would result if the transaction were allowed to stand, we ought not to interfere with the decision.

Taking the law to be as stated in *Ex p. McBurnie*, 1 DeG. M. & G. 446, that the settlement should be one which an honest woman reasonably advised, might have reasonably supposed to be fair and proper, and not grossly out of proportion to the station and circumstances of the husband; and in *French v. French*, 6 DeG. M. & G. 95, that if a settlement be made by a person, who, if he had not made the settlement, would have had property upon which the creditors might immediately have fastened, but which by the settlement is withdrawn from them, so that they are unable to get at it, that *prima facie* is an act which must delay them. Are the circumstances in the present case such as bring it within the rule?

Miss Hedley had been acquainted with Gore as long as she could remember, but had not seen him for eight years prior to 1883. She then goes to Rat Portage, where he is carrying on business as a storekeeper and hotelkeeper, on a visit it is said, and she does not seem to have been on a visit to anyone but Gore; she puts up at his hotel and is on terms of great intimacy with him; they are frequently walking together; she goes from the hotel to the store to summon him to dinner; he is often found in her room; and in the summer of 1883 they are engaged to be married: she remains in the hotel till January, 1884, when both go together to her home in St. Mary's, Ontario. After remaining some weeks there Gore returns to Rat Portage, and subsequently in July, 1884, he telegraphs for her to go there: she does go in July and remains there till October, when the settlement was executed, and on the following day they were married.

During the time she was staying in the hotel from ten to fourteen servants seem to have been employed in it, to whom wages were in arrear to about \$3,000. They were clamorous for payment, besieged the manager whenever they could catch him, demanding payment, which he had not the means to give them. Of this Gore was aware. And there is some evidence that some such demands were made of Gore in the presence of Miss Hedley. She denies

that she heard them, and I do not think it material to determine whether she did hear the particular demands spoken of. It appears, also, that she lent Gore money, or sent it to him for investment, and knew he did not invest it, but used it in his business. Drafts were presented to him in her presence, which were not paid, and the difficulty of finding funds to meet them was discussed before her. It is not credible that she paid no attention to these matters so deeply affecting the person she was to marry. Miss Hedley knew the property, and knew that it was all settled upon her.

Upon these facts, without attributing any undue intimacy or familiarity between Miss Hedley and Gore, it seems to me impossible to avoid coming to the conclusion that she must have been aware of his difficulties, and accepted a transfer of his property, not only grossly out of proportion to Gore's means, but actually all that he had, leaving him a dependent on her bounty.

I think the decision of the learned Judge fully justified by the evidence, and that it should not be disturbed.

G. A. B.

[QUEEN'S BENCH DIVISION.]

FROST V. HINES.

Action to recover land—1st and 2nd mortgagee—Lease by mortgagor after mortgage—Mortgagee in possession.

C., owner of the premises in question, mortgaged them on 6th February, 1880, to the C. P. L. & S. Co. On 17th March, 1883, C. made a second mortgage to L. who assigned to plaintiff. On 5th October, 1883, C. leased the premises to defendant for ten years from 1st April, 1884, at \$175 for the first year, and \$165 for subsequent years, payable in advance on 27th October in each year. The lease contained a clause that rent should be paid to H., or sent to the mortgagees "as payments of interest on loan made by the lessor." H. was the local agent of the first mortgagees. The clause referred to was inserted in the lease at the defendant's request. The rent payable on 27th October, 1883, 1884, and 1885, was paid by defendant to H., who remitted the money to the company. H. gave defendant receipts for the rent as agent for C. The company sent H. receipts for the money forwarded by him, expressing that the money was received on account of advances made to C. H. had no authority to receive money for the company. The company were not made aware of the existence of the lease, or of its provisions.

The plaintiff brought this action to recover possession of the mortgaged premises, his mortgage being in default. The defendant set up the lease and the clause referred to, the payment of rent to the company, and that he was tenant to the company, whose mortgage was in default. *Held*, [reversing the decision of *Boyd, C.*,] that, as the company received the money sent them by H. not as rent of the mortgaged lands, but on account of advances made to C., they could not under the evidence be held to be mortgagees in possession, and that defendant was not their tenant.

Held, also, that even if the company had been aware of the provision in the lease and had received the money with such knowledge, they would not have been mortgagees in possession with defendant as their tenant, as the money under the very terms of the provision would not have been received as rent, but "as payments of interest on a loan made by the lessor." The plaintiff was therefore held entitled to recover.

THE statement of claim was (1) that the plaintiff was the assignee of a certain mortgage given by one Isaac R. Cole to one William Leonard, the assignor of the plaintiff, bearing date the 17th day of March, 1883, and which was duly assigned by the said mortgagee William Leonard to the plaintiff on the 2nd day of February, 1886: (2) that the lands and premises given in mortgage and of which the plaintiff claimed to have possession, and to eject the defendant therefrom were the east half of farm lot 10 in the first concession of the township of Percy, in the county of Northumberland: (3) that the said mort-

gagor had made default in the payment of the moneys secured by said mortgage, by reason of which the plaintiff claimed the possession and the use thereof: (4) that the defendant was a tenant of said lands of said mortgagor under a lease entered into subsequent to said mortgage; (5) and the plaintiff claimed and prayed the Court to place him in the possession of the said lands and premises, and damages from the defendant for the depriving the plaintiff of the possession and use thereof.

The defendant by his statement alleged (1) that he was in possession of lot number 10 in the first concession of the township of Percy, in the County of Northumberland, as a lessee thereof for a term which had not yet expired: (2) that at and prior to the date of the said lease to the defendant the Canada Permanent Loan and Savings Company were mortgagees of the said lands and premises, under a mortgage made by one Isaac R. Cole to the said the Canada Permanent Loan and Savings Company, bearing date the sixth day of February, 1880, which said mortgage was prior to the mortgage now held by the plaintiff as mentioned and described in his statement of claim herein, and at the time of the said leasing to the defendant herein the said mortgage to the said the Canada Permanent Loan and Savings Company was largely in arrear, and by the terms of the said mortgage the said the Canada Permanent Loan and Savings Company were entitled to the possession of the said lands and premises in question in this suit, and to eject all persons therefrom. (3) By the terms of the said lease the rent reserved thereunder was payable annually in advance, and the above named defendant was at liberty to pay the same to the said the Canada Permanent Loan and Savings Company. (4) The defendant herein, before the commencement of this action, paid the rent for the year 1886 to the said the Canada Permanent Loan and Savings Company, and claimed to be entitled to retain possession of the said lands and premises as against the plaintiff, the defendant being the tenant of the said the Canada Permanent Loan and Savings Company, who were prior mortga-

gees and entitled to the lands and premises, and to the possession thereof, as against the plaintiff's claim herein.

Issue.

The case was tried at the last Spring Sittings of this Court at Cobourg, by the Chancellor of Ontario, without a jury.

It appeared that Isaac R. Cole, being seised in fee of the land in question, by indenture, dated the 6th day of February, A.D. 1880, made in pursuance of the Act respecting short forms of mortgage, conveyed the same to The Canada Permanent Loan and Savings Company for securing payment of the sum of \$3,451.20, in equal yearly instalments of \$172.56 each, on the first day of November in each year during the term of twenty years, the first of such payments to be made on the first day of November, A.D. 1880 : that the said Cole thereafter, by indenture dated the 17th day of March, 1883, made in pursuance of the Act respecting short forms of mortgages, conveyed the said land to one William Leonard for securing payment of the sum of \$700, with interest thereon at seven per cent., in seven years thereafter, with interest annually, on the first day of December in each year. This last-mentioned indenture of mortgage contained no reference to the prior indenture of mortgage, but contained the absolute covenants for title in the Act respecting short forms of mortgages: that the said Leonard thereafter by indenture, dated the second day of February, 1886, assigned the said last-mentioned mortgage to the plaintiff: that the said last-mentioned indenture of mortgage was in default: that the said Cole, by indenture, dated the 5th day of October, 1883, made between him and the defendant, demised to the defendant the said land, to hold for ten years from the 1st day of April, 1884, yielding and paying to the lessor, his heirs and assigns, the sum of \$175 for the first year, and \$165 for the subsequent years, in advance, on the 27th day of October in each year, which said last mentioned indenture contained a covenant to pay the rent reserved to the lessor, his executors, administrators,

and assigns, and a covenant with the lessor, his heirs and assigns, to pay taxes ; to farm in an husbandlike manner ; to crop the land by a regular rotation ; to protect the fruit trees ; to put out manure ; to allow incoming tenant to plough ; to eradicate weeds ; not to cut down timber ; to repair ; and other covenants. It also contained the following provision : "All rent shall be paid to R. P. Hurlburt, or sent to the mortgagees as payments of interest on a loan made by the lessor."

The reason for this provision was stated by the defendant as follows : "At the time I rented the place from Cole I asked him if there was a mortgage against it. He said there was. I said I want my rent to go to the company or to the company's agent. Then I said I would like to have it paid regularly, so that the company gets it, because in the last place I was on before I paid the rent to the man and he did not send it to the company, and I had bother, and I do not want any bother this time at all. I want my rent to go to the company. So it was put into the lease I was to pay it to Hurlburt."

The defendant further stated that his rent had all been paid up in advance according to the terms of his lease, and that he had paid it to Hurlburt because he was the company's agent. The following was his cross-examination :

"Q. I suppose Mr. Hurlburt was sending the money to the company for Mr. Cole? A. I don't know whether he was sending it for Mr. Cole or not, or whether he was sending it for the company, because he was working for them, I thought. Q. You wanted to make sure that the company would get the rent? A. Certainly, sir. Q. You did not want to trust Mr. Cole with it? A. No, I did not. Q. And therefore you proposed paying the money to Hurlburt? A. I presumed that if the company's agent got it the company would get it. Q. Anybody else would have answered the same purpose if the company got the money? A. I don't know about that. Q. Was it not your object to have no doubt that the company got it?

A. Yes. Q. That was the only thing you had in view ?
A. I wanted to make sure that the company got it. Q.
Was that the only mortgage that you were told of that
was on the place at the time ? A. Yes. It was only lately
you knew there was another mortgage ? A. I did not
know it until lately. Q. I suppose if you had you would
probably have provided in that place as well ? A. I could
not say. Q. You might not have taken the place at all ?
A. I consider when I was paying it to one company the
second was getting the good of it as well as the first ?
You only claim to hold this land under this lease with
Cole ? A. That is all, certainly ; I only claim to hold the
land according to the lease. Q. Mr. Cole is your landlord ?
A. Yes. Q. Anybody else ? A. That's all, sir."

The defendant proved the following receipts :

" Warkworth, October 27th, 1883.

" Received from Richard Hines the sum of one hundred and seventy-five dollars in full payment of the first year's rent under lease from Isaac R. Cole to Richard Hyne, of the east half of lot number ten in the first concession of the township of Percy, for 1884.

ISAAC R. COLE.

" Warkworth, November 1st, 1884.

" Received from Richard Hines the sum of one hundred and sixty-five dollars on account of rent of the east half of lot No. 10 in the first concession of the township of Percy, for Isaac Cole the landlord, for the year 1885.

" R. P. HURLBURT.

" Warkworth, November. 3d, 1884.

" Received from Richard Hines the sum of seventy dollars on account of rent of farm of I. R. Cole, to be paid to the Canada Permanent Loan and Savings Company at Toronto, on mortgage of I. R. Cole.

" R. P. HURLBURT."

“Warkworth, November 19, 1885.

“Received from Richard Hines the sum of ninety-five dollars, balance of rent due from him to I. R. Cole, on east half of lot number 10, in 1st concession of the township of Percy, for the year 1886, as set forth in said lease.

“ISAAC R. COLE.

“*Per* R. P. HURLBURT.”

Hurlburt swore that he was agent of the Canada Permanent Loan and Savings Company: that he had received money on account of the mortgage to the Canada Permanent from Hines, the defendant, and had given him the above receipts, and he produced six receipts from that company all in the same form, and all crossed in red ink, as follow: “All payments must be made direct to the office in Toronto, and no receipt is valid unless bearing the signatures of the president and managers of the company.”

The first two were dated November 1st, 1883, for \$6.92 and \$168.08 respectively; the third, dated November 4, 1884, for \$160; the fourth and fifth, dated the 5th November, 1885, for \$24 and \$46 respectively, and the sixth dated November 21, 1885, for \$90. All purported to be received from R. P. Hurlburt on account of advance made to Isaac R. Cole.

Hurlburt also swore that the money paid to him by the defendant was paid to him as agent for the Canada Permanent: that he did not draw the lease, nor did he see it till a year or so after it was executed: that he knew of the arrangement in the lease at the time: that he thought he wrote to the company at that time, but he would not say positively: that the defendant came to him at the time he was perfecting the lease, and Cole said he was behind in his payments to the company, and Hines said he had had a difficulty in the place he was on before, and he wanted the money that he paid for the rent to go to the company: that they came to him and paid the money then in advance about the time the lease was executed: that that was the first: that he had not made any de-

mand: that he had told Cole of the arrears, and after that he generally paid it pretty promptly.

"Q. Did you ask him for this last year's instalments, Hines, I mean? A. He came in and spoke to me about it; I don't know whether I personally said to him, Are you going to fix up that money or not? He came in and spoke to me about it. Q. Supposing the money had not been paid? A. We would have looked to him for it, because he had agreed to pay it to us, and we looked to him for it. Q. If the money had not been paid, what would have been the effect? A. I could not say, but I presume that the company would have tried to enforce their payments as they generally do."

He further stated as follows on cross-examination: "Q. You have been acting for the company for some years? Q. Yes. Q. Mr. Hines came to see you about it at the time he was getting the lease drawn? A. In the first place, yes. Q. He intimated that he had been troubled before by some mortgagee? A. By some mortgages on the place he had been on before, and he wanted to make himself safe. Q. And to see that the rent would reach the company's hands? A. Yes, that was his intention. The provision in the lease shows it was to be payable over to me. Q. You looked upon it that you were a sort of intermediate party between Cole and him, to make certain on Hines's behalf that the rent would reach the company? A. Yes, that was the intention. Q. You then of course received the money and gave these receipts? A. Yes. Q. You signed this one Isaac R. Cole, per R. P. Hurlburt? A. Yes."

Robert R. Robb, registrar of the Canada Permanent Loan and Savings Company, swore that all arrears upon the Company's mortgage up to December 31st, 1882, had been arranged: that on the 1st of November, 1883, there was paid an instalment in arrear: that on the 1st of May, 1886, there would be \$71 in arrear. "Q. Who has been making these payments? A. I don't know who has been making them; they have been made on behalf of Cole, I fancy. Q.

How do you get them? A. They are remitted, I think, by the appraiser. Q. Who is that? A. Mr. Hurlburt, of Warkworth. Q. These payments are made to him for the company, and he transmits them to you? A. He transmits them to me." On cross-examination: "Q. I understand you to say that the first arrears would be about the 1st of November, 1883, the first arrears in respect of that? A. After the settlement. Q. After the settlement? A. First November, 1883: the settlement took place on the 1st of November, 1882. Q. And the payments by the mortgage I think are payable on the 1st of November? A. On the 1st of November, yearly. Q. You have received moneys since? A. We have received moneys since. Q. And these moneys are remitted on Mr. Cole's behalf? A. I presume so. I cannot say positively." On re-examination: Q. "You got them from Mr. Hurlburt? A. From Mr. Hurlburt; he is the appraiser of the company. A list of persons in arrear is sent by the company and they are instructed to try and collect them. Q. Instructed to demand payment? A. To effect a settlement; the list is generally made out in spring and fall. Q. That is your invariable custom, I suppose? A. That is the custom."

The learned Chancellor thereupon gave the following judgment:

BOYD, C.—Further consideration has confirmed my opinion that the plaintiff is not entitled to succeed and obtain a recovery of the possession of the land. The defendant is lessee under a lease subsequent to the plaintiff's mortgage, but the plaintiff's mortgage is subsequent to that made to the Building Society. The first mortgagees have the legal estate and the first right to enjoy the possession of the mortgaged premises. It was a term of the defendant's lease that the rent should be paid to the first mortgagees, and though they were not parties the term was made known to them and acquiesced in by the receipt of the rent from time to time. The rent is payable in advance, and last November the defendant paid rent up till November of this year, which being received by the first mortgagees, enures to the benefit of the plaintiff as

second mortgagee. If the plaintiff now recovered possession, he would be in effect getting the year's rent twice over applied in reduction of his mortgage, at the expense of the defendant, who has made a valid payment to the parties entitled to receive his rent. When a mortgagee receives rent from a tenant of the mortgagor, that is tantamount to the entering into possession of the land in respect of which the rent is paid. That is recognized by Jessel, Master of the Rolls, in *Harlock v. Ashbury*, 19 Ch. D. 246, as still the effect of such a transaction. Such is the legal result, it appears to me, whether the payment is voluntary or enforced. In this case it was a payment suggested by the tenant, assented to by the mortgagor (the landlord), and being communicated to the mortgagees, acted on by them, as evidenced by the yearly receipts of the rent. This being so, they have treated the tenant not as a trespasser, but as one lawfully in possession under them; and this recognition of his rights by the only person *legally* entitled to the possession, secures him against being ousted by a subsequent equitable owner; in short, the possession of the defendant during the period for which he has paid rent in advance, is the possession of the legal owner, and this cannot be disturbed by a mortgagee of the equitable estate upon such a record as the present.

The action must be dismissed, with costs.

May 29, 1886, *Lash*, Q. C., moved to set aside and reverse the said judgment, citing *Coote* on Mortgages, 4th ed., 711; *Jones* on Mortgage, sec. 776; *Leith's* Blackstone, 2nd ed., 217; *Corbett v. Plowden*, 25 Ch. D. 678.

Hoyles, contra, referred to *Mayor of Poole v. Whitty*, 15 M. & W. 578; *Coote* on Mortgages, 5th ed., pp. 787; 788; *Doe Higginbottom v. Barton*, 11 A. & E. 307; *Smith v. Eggington*, L. R. 9 C. P. 145; Woodf. L. & T. 12th ed., pp. 50, 52.

December 23, 1886. ARMOUR, J.—The plaintiff is entitled to recover unless it can be established that the defendant is in possession as tenant of the mortgagees, the Canada Permanent Loan and Savings Company, and not as tenant of Cole, the mortgagor: *Reid v. Macbean*, 8 C. P. 246.

The contention that the defendant is in possession as tenant of the mortgagees is rested entirely upon the provision in the lease that "all rent shall be paid to R. P. Hurlburt, or sent to the mortgagees as payments of interest on a loan made by the lessor," the communication of this provision to the mortgagees, the payment of such rent to Hurlburt, and the receipt by the mortgagees from Hurlburt of the sums so paid to him.

This provision was inserted in the lease not at the suggestion of the mortgagees, nor of Hurlburt, but only at the instance of the defendant, and although Hurlburt knew of it at the time he did not see it till a year or so after, and although he said he thought he wrote to the mortgagees at the time he became aware of it, he would not say so positively, and subsequent application to the mortgagees has failed to produce such a letter.

It is not in my opinion proved that the mortgagees were ever made aware of this provision, but if they had been they would have only been aware of the very terms of the provision that all rent should be paid to Hurlburt or sent to the mortgagees, not as rent to them as landlords, *but as payments of interest on a loan made by the lessor.*

Hurlburt was the appraiser of the mortgagees at Warkworth, according to the statement of the registrar of the mortgagees, and agent of the mortgagees, according to his own statement; but in neither capacity would he have power to bind the mortgagees by his assent to this provision, nor would notice to him of it affect the mortgagees.

He said, however, that the money was paid to him as agent of the mortgagees; but on cross-examination he shewed what he meant by this, by stating in answer to the question, "You looked upon it that you were a sort of intermediate party between Cole and the defendant, to make certain on the defendant's behalf that the rent would reach the mortgagees," that that was the intention.

It is quite clear from the receipts which he gave that he did not receive the rent as agent of the mortgagees, but as agent of the mortgagor; and that it is equally clear

that he had no power to receive it as agent of the mortgagees their receipts obtained by him for the payments he made to them abundantly shew.

The true conclusion, therefore, from the evidence, in my opinion, is that the mortgagees received the money sent to them from time to time by Hurlburt, not as rent of the mortgaged land, but, as the receipts they gave for it express, as money received on account of advance made to Cole.

I do not see how, upon the evidence, the mortgagees could be charged as mortgagors in possession, and if they could not be so charged it is conclusive against the contention that the defendant was their tenant.

Even assuming the inferences of fact drawn by the learned Chancellor to be properly drawn from the evidence, I cannot agree that they would suffice to charge the mortgagees as mortgagors in possession, and to establish the defendant's tenancy to them.

It was held in *Wheeler v. Branscombe*, 5 Q. B. 373, that a tenancy under a mortgagor was not affected by an authority from the mortgagor to the mortgagee to receive the rents, though perhaps such a power might be irrevocable and justify all payments made under it while the mortgage debt continued.

In *Noyes v. Pollock*, 32 Ch. D. 53, Cotton, L. J., said: "In order to hold that a mortgagee, not in actual possession, is in receipt of the rents and profits, in my opinion it ought to be shown not only that he gets the amount of the rents paid by the tenants, even although he gets their cheques or their cash, but that he receives it in such a way that it can be properly said that he has taken upon himself to intercept the power of the mortgagor to manage his estate, and has himself so managed and received the rents as part of the management of the estate.

To my mind a great deal of argument here turns upon the equivocal use of the words receipt of rents, because it was said that as the mortgagees here have got, or tried to get the whole amount that was paid for rents,

they are in receipt of the rents. They are in receipt of the sum of money, the amount of which was determined by the rents received; but they were not in receipt of the rents as intercepting between the tenant and the mortgagor or his agents the rents which were payable for the land by the tenants, or as part of the management of the estate undertaken by them. * * * *

Undoubtedly, as I have said, if a mortgagee only intercepts rents after they have been received by the agents of the mortgagor, then those rents having gone to the mortgagor, have not been intercepted by the mortgagee in such a way as to shew that he deprives the mortgagor of the control and management of the property."

And Bowen, L. J., said: "But in the case where an estate is let to tenants, of course the mortgagee does not enter upon actual occupation of the demised premises. He may fall under the principle as a person who enters and takes possession of the rents and profits; but only, as it seems to me, if he does something which goes beyond the mere receipt of sums of money to which the rents and profits may amount, and reaches a point at which he displaces, for the purpose of realizing the security, the mortgagor from the control and dominion of the reversion of the estate which is demised. Unless the dominion and control is taken in that sense, the mere receipt of the produce of the management may be taken by the mortgagee, and yet he may stop short of taking the management itself. He may take the rents. That is not enough unless he takes the rent in such a way as to take upon himself, and out of the hands of the mortgagor, the business and the duty of collecting and being diligent in that respect."

I think that what was said in *Noyes v. Pollock* is conclusive of this case. Nothing whatever was done in this case which had the effect of changing the relationship of landlord and tenant between Cole and the defendant created by the lease of October 5th, 1883, or of depriving Cole of the control and management of the mortgaged land as landlord

of the defendant, or of making the mortgagees the defendant's landlords; and nothing has happened, so far as shewn by the evidence, which would afford to the defendant any answer to any action that might be brought by Cole against the defendant for a breach of any of the covenants contained in the lease, except the covenant to pay rent.

In my opinion, Cole is still, as the defendant himself swore, the defendant's landlord.

The motion will therefore be absolute to enter judgment for the plaintiff, with costs.

WILSON, C. J., not having been present at the argument took no part in the judgment.

O'CONNOR, J., concurred.

*Motion absolute to set aside judgment,
and enter judgment for plaintiff, with costs.*

[CHANCERY DIVISION.]

THE NATIONAL FIRE INSURANCE COMPANY ET AL. V.
MCLAREN.

Insurance—Subrogation—Action against wrongdoer—Estoppel by verdict and judgment—Res inter alios actæ.

There can be no such thing as subrogation to the right of a party whose claim is not wholly satisfied.

In a case of partial insurance where a third party is liable to make good the loss, the assured is not clothed with the full character of trustee *quoad* the insurance companies until he has recovered sufficient from the wrongdoers to fully satisfy all his loss as well as expenses incurred in such recovery. In other words, when the assured is put in as good a position by the recovery from the wrongdoer, as if the damage insured against had not happened, then for any surplus of money or other advantage recovered over and above that the insurer is entitled to be subrogated into the right to receive that money or advantage to the extent of the amount paid under the insurance policies. The defendant having been paid \$50,000 insurance moneys under various policies effected by him upon certain lumber, which had been burnt by a spark from an engine of the C. C. R. W. Co., afterwards brought action against the railway company and recovered a verdict of \$100,000; the jury finding that that "was the actual value of the lumber destroyed." The insurance companies now brought this action against him claiming that he was trustee for them for so much of the \$100,000 as represented the excess of the total moneys received by him over the amount of his loss, contending that he was estopped by the verdict from asserting his loss to be greater than that amount. The defendant, however, contended that his actual loss had exceeded the whole \$150,000.

Held, that he was not concluded from so contending by the finding of the jury in his action against the railway company, and that the utmost right of the plaintiffs was to have the amount recovered as damages from the railway company brought into account together with the moneys previously paid by the plaintiffs for insurance in order to ascertain whether the defendant had been more than fully compensated for his total loss by fire and other loss and outlay connected with the litigation, and for these purposes the matter was referred to the Master.

THIS was an action brought by the National Fire Insurance Company of New York, and a number of other fire insurance companies, against one Peter McLaren to recover from him certain insurance moneys paid by them to him.

The statement of claim set out that the defendant in 1879 was owner of a lumber yard at Carleton Place and of certain railway tracks running therefrom, in and about which was stored a large quantity of lumber belonging to

him; that on certain dates prior to and in that year he, by policies of insurance, effected different insurances against fire with the plaintiffs, each of the policies being for a sum of \$2,500, and being on lumber, laths and pickets belonging to him at Carleton Place; and that he also held certain other policies of insurance upon the same property, making a total insurance, with the plaintiffs' policies, of \$50,000: that all the said policies being in force, on May 27th, 1879, his said property was set on fire by sparks from an engine of the Canada Central Railway Company, and a large portion destroyed: that he thereupon claimed from the plaintiffs and other companies the amounts insured, claiming a total amount of loss of \$115,188.75: that they, the plaintiffs, and the other companies thereupon paid him the amount of the policies, viz., \$50,000 in all: that on September 22nd, 1879, he commenced an action for damages against the railway by reason of the fire caused, as alleged, by their negligence, and on March 24th, 1882, in the Common Pleas Division, recovered against the railway \$100,000 for his damages, and \$2,617.65 for his costs, which amounts were paid him by the railway on October 15th, 1884: that the action was tried by a jury, and one of the specific questions submitted to them was, "What was the actual value of the lumber destroyed?" to which the answer was "\$100,000, including ties and rails": and the plaintiffs claimed that the defendant having obtained from the railway company a sum larger than the difference between the amount of the insurance and the amount of his loss, he, the defendant, was a trustee for that excess for the plaintiffs respectively in proportion to the amount of their insurances respectively, repayment of which he had, however, refused. And each of the plaintiffs claimed that the defendant might be declared trustee for them respectively of the amount so paid by them to him; and payment to them respectively of the said sums and further relief.

By his statement of defence the defendant admitted having effected the policies as alleged, and the fact of the

fire, and that after the fire he did receive from the plaintiffs and the other insurance companies \$49,577.78, of which \$34,722.90 was paid by the plaintiffs: that shortly after he made his claim against the insurance companies the latter sent an agent to inspect his lumber yard and books and adjust his claim, who satisfied himself that beyond all doubt the defendant had sustained a loss far in excess of the whole insurance, and suggested to him, the defendant, that it was not necessary to set forth under these circumstances full and exact particulars of his loss in his proofs of loss; and acting on this suggestion he understated his losses to the insurance companies, as they were well aware at the time: that he did receive \$100,000 and taxed party and party costs from the railway company as alleged, but that the valuation placed by the jury on the property destroyed was very considerably less than the real value thereof, as given in evidence at the trial, and that he was not bound by such valuation, nor could the plaintiffs, who were not parties to the said action, take any advantage thereof or claim any benefit therefrom: that he was not a trustee for the plaintiffs of any part of the moneys received by him from them and the other insurance companies, and that his actual loss by reason of the fire exceeded the sum received from the insurance companies and the railway: that even if he could not now assert that the value of his property destroyed by the fire exceeded the valuation placed thereon in his particulars of loss, which he denied, yet his outlay in connection with the fire, the interest on his losses, his solicitor and client costs in his action with the railway, &c., amounted to considerably more than the difference between the value of the lumber, as shewn in the particulars of loss, and the moneys received by him both from the insurance companies and the railway company.

The action was tried at Toronto on November 8th, 1886, before Boyd, C.

C. Robinson, Q. C., and J. F. Smith, Q. C., for the plaintiffs. The owner of a property insured against fire is, on its being burnt down by the wrongful act of another solely interested in the loss until the insurance moneys are paid, when the loss becomes a joint loss, and if the owner then sues the wrong-doer he sues for both himself and the insurers. In that sense we are privies to the judgment against the railway company. We are bound by it, and could never claim more against the wrong-doer than was awarded by it: *Commercial Union Assurance Co. v. Lister*, L. R. 9 Ch. 483; *Hart v. Western Railroad Corporation*, 13 Metc. 99; *Darrell v. Tibbitts*, 5 Q. B. D. 560; *Garrison v. Memphis Ins. Co.*, 19 How. 312; *Hall & Long v. Railroad Company*, 13 Wall. 367; *Monmouth, &c., Ins. Co. v. The Camden, &c., Transportation Co.*, 21 N. J. Eq. 107; *North of England Iron Steamship Insurance Association v. Armstrong*, L. R. 5 Q. B. 244; *Gales v. Hailman*, 11 Penn. 515; *Reesor v. Provincial Ins. Co.*, 33 U. C. R. 357.

D. McCarthy, Q. C., and Creelman, for the defendants. No doubt on payment of all that the insured has lost the insurance company is entitled to the assignment of all he has which gives him the right to recover against the wrong-doer; but there is no such right on payment of only part of the loss. The insurers could not require the assignment of half the cause of action, nor compel the insured to sue the wrong-doer, nor exact a declaration of trust from him. We are arguing on the theory that our loss is over \$100,000 in addition to what has been paid by the insurance companies. In the action against the railway company the great doubt was whether the railway company were liable at all; now if the present defendant had wished to compromise that action for \$75,000 could the insurance companies have hindered him from doing so? Suppose the verdict recovered in the action against the wrong-doers in such a case as this could not be made out of the wrong-doer, would it be conclusive as against the insurers in an action by the insured against them? See *Burnand v. Rodocanachi Sons & Co.*, 7 App. Cas. 333.

Robinson in reply. The defendant proposes now to litigate all over again what has been already litigated once. Estoppel should apply here. The right of subrogation arises when we make the payment, we contend, and not when the full amount of the loss is recovered. See *Newcomb v. Cincinnati Ins. Co.*, 22 Ohio 382.

November 30th, 1886. BOYD, C.—McLaren the defendant insured property in his lumber yard against loss by fire to the extent of \$50,000, with twenty insurance companies now represented by the plaintiffs. A loss having occurred by fire which was supposed to be occasioned by the emission of sparks from the engines of the Canada Central Railway, he made claim [against the insurance companies and received from them the amount insured. He afterwards proceeded against the railway company as tort-feasors, and after lengthened litigation recovered at the hands of a jury the sum of \$100,000 for damages. Certain questions were submitted to the jury, among which was this: "What was the actual value of the lumber destroyed?" to which they answered "\$100,000, including ties and rails." This action is now brought by the insurers to recover the \$50,000 as money received to their use by the assured on the ground that his whole loss has been compensated for by the recovery of the \$100,000 which the jury assessed as the total actual value of what was destroyed by fire.

Both parties agree that the equitable doctrine applies by which the insurers are entitled to be subrogated into the benefit of all compensation received by the assured from wrongdoers. But they differ as to the application of this doctrine to the circumstances of this case. The plaintiffs contend, in substance, that the right to subrogation arose when the companies made payment of the insurance to McLaren, and that he then became trustee for them *pro tanto* and in this character prosecuted his litigation against the railway company. As a consequence from this, they further argue that the finding of the jury as to

the actual total loss is binding and conclusive on McLaren as well as upon the plaintiff companies, because as beneficiaries they were privies to that judgment, and therefore, they say, as a further consequence, the defendant is now estopped from proving in this action, that his actual loss was more than \$100,000.

The doctrine of subrogation is a creature of equity not founded on contract, but arising out of the relations of the parties. In cases of insurance where a third party is liable to make good the loss, the right of subrogation depends upon and is regulated by the broad underlying principle of securing full indemnity to the insured, on the one hand, and on the other of holding him accountable as trustee for any advantage he may obtain over and above compensation for his loss. Being an equitable right, it partakes of all the ordinary incidents of such rights, one of which is that in administering relief the Court will regard not so much the form as the substance of the transaction. The primary consideration is to see that the insured gets full compensation for the property destroyed and the expenses incurred in making good his loss. The next thing is to see that he holds any surplus for the benefit of the insurance company. In the case in hand the plaintiffs are in some sense sureties, by way of contrast with the wrongdoers, who are primarily liable, just as the defendant may be in some sense a trustee for the insurers of any such overplus. But it appears to me to be a begging of the question to assert that he is a trustee from the time of payment by the insurers.

That may be a correct position if the defendant had been fully insured, and a total loss had occurred. If, then, the companies had paid the entire value they would be entitled to use the name of the assured in order to recover from the wrongdoers. (See per Willes, J., in *Dickenson v. Jardine*, L. R. 3 C. P. at p. 644.)

But where as in this instance the insurance is only *partial*, and the loss is to a much greater extent (as is admitted) than the aggregate of the insurances, the attri-

bute of trusteeship *pro tanto* is not to be implied, so as to estop the assured from proving as against the insurers the real extent of his loss. In the present case McLaren asserts and is prepared to shew that his total loss was \$150,000 by reason of the fire, and claims that he will not be fully compensated for his outlay in costs, damages, loss of interest and the like by what he has received from both railway and insurance companies. This contention if well founded in fact is of paramount importance, and must prevail against technical reasoning based upon trusteeship and estoppel.

It is laid down in *Kyner v. Kyner*, 6 Watts (Penn.) 221, that there can be no such thing as subrogation to the right of a party whose claim is not wholly satisfied. The Court it is said cannot interfere with his security while part of his debt remains unpaid. Many other cases to the like effect are to be found in *Sheldon* on Subrogation, sec. 127. This principle appears to have guided the decision of the Court of Appeal in *Commercial Union Assurance Co. v. Lister*, L. R. 9 Ch. 483. I find it is stated in Mr. Bunyon's book on Fire Insurance, 3rd ed. p. 128, that the right to subrogation does not arise until full payment, satisfaction or indemnity is provided for.

It appears to me, therefore, more correct to say that the assured (in case of partial insurance) is not clothed with the full character of trustee quoad the insurance companies until he has recovered sufficient from the wrongdoers to fully satisfy all his loss as well as expenses incurred in such recovery. In other words, when the assured is put in as good a position by the recovery from the wrongdoer, as if the damage insured against had not happened, then for any surplus of money or other advantage recovered over and above that, the insurer is entitled to be subrogated into the right to receive that money or advantage to the extent of the amount paid under the insurance policies. To adopt the language of Lord Blackburn in *Burnand v. Rodocanachi Sons & Co.*, 7 App. Cas. at p. 339, it then becomes an equity that the person who has already paid so much of the indemnity for the loss is entitled to be recouped by having

that sum back. See also per Brett, L. J., in *Castellain v. Preston*, 11 Q. B. D. at p. 391. Therefore, in this case before the plaintiffs can succeed it lies on them to shew that in equity and good conscience the defendant has received moneys which he ought not to retain, but should pay over to them as received to their use, and this cannot be done by a fiction or by holding that there is an estoppel on the defendant which precludes him from proving the truth as to his actual loss.

The very point, however, as to the admission and relevancy of the judgment in the action against the railway appears to have been discussed in one New York case, which is first reported in 1839: *Pentz v. The Receivers of the Aetna Fire Insurance Co.*, 3 Edw. Ch. R. 341. The headnote states that "where property and merchandise were destroyed by gunpowder, under the city authorities, to stop the ravages of fire and the owners, who were insured, claimed and obtained a verdict through a jury against the corporation; although it amounted to less than the insurance and absolute loss; it was held that the owners could not resort to the insurance company for a balance, and that the jury must be presumed to have passed on the whole amount." McCoun, V.C., in giving judgment said, at p. 344, "the difficulty is about admitting evidence to gainsay, the finding of the jury. The petitioners (*i.e.*, the insured) claimed the full amount of their loss; and it was the duty of the jury to give it to them. The jury had no right to take into consideration the fact or amount of insurance by way of diminishing their claim on the corporation. There is no direct or positive proof that the jury did so. This Court must presume that the jurors performed their duty and allowed the whole amount of the loss proved before them, especially as the petitioners have so far acquiesced in the verdict or inquisition, as to take no measures to set it aside or to alter it." He further goes on to say, "If the verdict is not conclusive on this point and the petitioners are still at liberty to claim beyond or

in addition to it upon the policies of insurance, then this consequence is to follow: that the corporation of New York, after once paying all the damages that a jury have found against them, and which was intended to cover the whole loss, may be liable to pay an additional amount in an action against them on behalf of the insurers." p. 344. Being brought up in appeal in 1842 before Walworth, C., this decision was reversed as reported 9 Paige Ch. 568.

The Chancellor said, "I think the Vice-Chancellor erred in supposing the verdict of the jury upon the assessment was conclusive evidence between these parties as to the actual amount of the loss which the petitioners had sustained. As between the petitioners and the city corporation it was conclusive. And as the insurance company could have no claim against the city of New York, except through the petitioners, and as being subrogated to their right, it would be conclusive as between the corporation and that company.

* * The application for an assessment against the corporation was, therefore, for the benefit of the insurers to the extent of the insurance, and for the benefit of the petitioners for the residue of the loss. And if the jury, without any fault on the part of the assured, should refuse to give the whole amount of the loss, * * there is no principle which can make that decision conclusive as to the actual extent of the loss as between the insurer and the assured," p. 571.

This decision is referred to with approval in *Phillips on Insurance*, section 1484, where in the note the author gives reasons for such an estimate of damages not being conclusive, thus: "the estimate of the damage by the demolition, may refer to a building already on fire, which might possibly have been saved, and so is not necessarily an estimate of the value insured and destroyed. Besides it is *inter alios*." See also sections 1711, 1750, 2144. I notice the high commendation bestowed upon this text writer by Lord Esher, M. R., in *Blackburn v. Vigors*, 17 Q. B. D., at p. 561, when contrasting him with Arnold and Duer, he speaks of Phillips as always "the more accurate guide." And, again, of "his italicised propositions which are always nicely accurate," p. 563.

Another decision in substantially the same line as the New York case is *Newcomb v. Cincinnati Ins. Co.*, 22 Ohio p. 382, decided in 1872, and also reported in 10 Am. Rep. 746, from which it is cited by Mr. Bunyon at p. 125. He also cites *Pentz v. Aetna Fire Ins. Co.* at p. 53 and takes the same view of the effect of that decision as Phillips. I have also to refer to a case which does not appear to be noticed by any of the text writers in which *Pentz v. Aetna Fire Ins. Co.* is followed by Lowell, J., *Dunham v. N. E. Mut. Ins. Co.*, 1 Low. (District of Massachusetts) 253, in which it was decided that the decree of the High Court of Admiralty in England, for damages for collision, though satisfied, is not a bar to a suit against an insurer of the injured vessel, where the amount of the decree is proved to be less than the loss actually suffered. The Judge held that the English decree was *res inter alios*, and though admissible as evidence it did not prove that full satisfaction had been obtained because there was no privity between the insurance company and the ship which had occasioned the injury as joint contractors or joint trespassers, which should make a satisfaction obtained from one a conclusive settlement in favour of the other. He goes on to say at p. 254, "between the assured and his underwriter the former is only bound to good faith and reasonable diligence. If the underwriter pays the loss, he is subrogated to the rights of the assured against third persons. If the assured recovers of the others he must give credit for the amount recovered, and if he fraudulently refuses to prosecute and attempts to release a trespasser, he must still give credit for all that he might have recovered. * * But it does not follow that the judgment recovered by the assured against the trespasser is conclusive evidence of the amount of the loss. Try it in the reverse case, and suppose the decree not to have been satisfied, without any fault on the part of the assured, would it be evidence against the underwriter of the amount of the loss? Or would a compromise effected in good faith and with reasonable diligence discharge the insurer? * * It is open, as I have said, to

the respondents" (the insurers) "to show that the libellant" (assured) "might have recovered more by due diligence, but in the absence of any such allegation or proof * * I cannot admit it as a bar." p. 255.

At the end of the case it is noted that this decree of the District Court of the U. S. was on appeal to the Supreme Court affirmed on the merits, May term, 1871, (see p. 257), but I have not been able to find any report of that final judgment.

Several reasons might be given in addition to those suggested by these citations from American judges, why in this case the finding of the jury should not conclude the defendant. One will suffice: it was competent for the jury to award as damages the profits which were lost to the proprietor of the lumber yard, based upon the market value at the time of the fire; this might be greatly in excess of the actual cost of the property destroyed, which would be all that was covered by the policies. Again it is to be noted that the contest in the litigation with the railroad did not turn so much on the extent of the loss as upon the question whether or not the railroad was liable at all. The difficulty was to fix the liability upon the railroad as wrong doers, that is to prove that they were guilty of negligence in the use of their engine. McLaren having overcome this difficulty and gained a verdict for \$100,000, acted wisely in not further agitating the question of its insufficiency, and so jeopardizing his chance of success even to this extent. No want of diligence—no imputation of bad faith can be asserted against the defendant, nor is it even hinted at on the part of the companies. This element of fraud being alleged in the settlement, is the reason of the decision in *The Monmouth County, &c., Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107, and it does not apply to the present case. I am thus led to this conclusion, that the utmost right of the plaintiffs' here is to have the amount recovered as damages from the railway company brought into account, together with the moneys previously paid by the plaintiff companies for insurance,

in order to ascertain whether the defendant has been more than fully compensated for his total loss by fire, and other loss and outlay connected with the litigation; for this purpose the matter will be referred to the Master. If the plaintiffs decline to take a reference (as I understood they would, unless I held in their favor on the point of estoppel), then the action is dismissed, with costs.

If there is a reference costs and further directions will be reserved.

A. H. F. L.

[CHANCERY DIVISION.]

BERRIE ET AL. V. WOODS.

Landlord and tenant—Covenant to pay for improvements—Covenant running with land—Equitable lien.

B. demised certain lands to W. by deed of lease, containing an agreement that, "at the expiration of the lease, the lessor, his heirs or assigns will pay the said lessee, &c., one half of the then value of any permanent improvements he may place upon the said lands," &c.

He'd, that the liability to pay for the said improvements ran with the land and attached as an equitable lien thereon as against the plaintiff, to whom B. had conveyed the said land, such lien attaching on the title which B. had at the time of such conveyance to the plaintiff, and that on the expiration of the term, the latter could only recover possession of the said land subject to such lien.

Reference to the Master ordered to fix the value of such improvements.

THIS was an action brought by Louisa Berrie and Mary Ann Berrie against William Woods to recover possession of certain lands and mesne profits since April 15th, 1886.

In their statement of claim the plaintiffs set up that about April 6th, 1876, one James Berrie by deed demised the said lands to the defendant, who continued tenant thereof until the expiration of the term, on April 6th, 1886: that James Berrie, on April 15th, 1886, by deed conveyed the said lands to the plaintiffs in fee as tenants

in common, but the defendant refused to give up possession, though the plaintiffs had duly demanded it.

By his statement of defence the defendant set up the agreement on the part of the lessor and his assigns to pay one-half the value of permanent improvements made upon the land by him, which is set out in the judgment, and claimed a lien on the lands for the said value, and declared that on payment thereof he was willing to deliver up possession to the plaintiffs, who, he alleged, had full notice of the said agreement as to improvements when they took their deed; and the defendant counter-claimed accordingly for the value of the said improvements, and if necessary a sale of the lands; and that he might be declared entitled to possession until the said lien should be satisfied.

By their reply the plaintiffs denied, amongst other things, that if any such agreement as to improvements was ever entered into, it was binding upon them, or created any lien on the land, for that James Berrie was not seised of the said land absolutely in his own right, and had no authority to enter into such an agreement; and further alleged that they were purchasers for value without notice of the alleged agreement.

By rejoinder the defendant said that James Berrie was at the date of the lease, and during the term thereby granted, seized in fee of part of the lands, and in the rest he had a life estate, the remainder being vested in the plaintiffs, and that the plaintiffs had actual notice of the said lease and agreement.

The action was tried at Toronto, before Boyd, C., on November 20th and 22nd, 1886.

Moss, Q. C., and *Meek* for the plaintiffs. The claim for the value of the improvements is only personal and does not bind the assigns: *Ramsden v. Dyson*, L. R. 1 H. L. 129; *Emmett v. Quinn*, 7 A. R. 306; *Grey v. Cuthbertson*, 4 Doug. 351; *Woodf. on Landlord and Tenant*, 13th ed., p. 164; *In re Thomas Haisley*, 44 U. C. R. 345; *Spencer's Case*, Sm. L. C., 8th ed., vol. 8th, p. 68.

Millar for the defendant cited *Paull's Executors v. Eldred and Hill*, 29 Penn. 415; *Abbey v. Merrick*, 27 Mississippi R. 320; *Ecke v. Fetzer*, N. W. Rep. 266; *Gummerson v. Banting*, 18 Gr. 516; *Bevis v. Boulton*, 7 Gr. 39; *O'Connor v. Dunn*, 37 U. C. R. 430; *Austerberry v. Corporation of Oldham*, 27 Ch. D. 750.

November 24th, 1884. BOYD, C.—In *Emmett v. Quinn*, 7 A. R., at p. 318, Mr. Justice Burton says: "When the covenantor names his assigns it evinces an intent to bind the land, and the obligation becomes connected with the estate." Such appears to be the manifest scope of the words used in the lease now in hand. The engagement is thus expressed: "At the expiration of the lease the lessor, his heirs or assigns will pay, or cause to be paid, to the said lessee, &c., one-half the then value of any permanent improvements he may place upon the said lands; provided, however, if the lessor, his heirs or assigns at the expiry of the term grant a new lease for a further period of five years the said improvements shall belong to the said lessor, his heirs or assigns." The lessor here undertakes that his assigns will pay for the improvements, and as between the parties the intendment from the last words used is that until paid for they shall belong to the tenant.

Apart from this, however, my opinion is that the liability to pay runs with the land, and attaches as an equitable lien thereon against the plaintiff. I refer to *Gorton v. Gregory*, 3 B. & S. 90; *Williams v. Earle*, L. R. 3 Q. B. 739; *Mansel v. Norton*, 22 Ch. D. 769; *In re Thomas Haisley*, 44 U. C. R. 347; *Ecke v. Fetzer*, 26 N. W. Rep. 266; *Minshull v. Oakes*, 2 H. & N. 793.

Possession is to be delivered forthwith to plaintiffs subject to a lien on the property for the value of the defendant's improvements under the terms of the lease; costs of defence to hearing to be added to lien; lien to attach on title which James Berrie had prior to the deed to the plaintiffs.

Reference to the Master to fix the value of improvements and to deal with subsequent costs.

[CHANCERY DIVISION.]

JENKINS V. DRUMMOND ET AL.

Will—Devise to children—Period of distribution—Survivorship—Who entitled.

S. P. by her will provided as follows : “ Also, I will and ordain that my said (property) after the death of my before mentioned daughters E. O. W. and S. A. W., be sold * * and the proceeds * * be divided between the children of my daughters E. O. W., M. K., and S. A. W., * * one-third to the children of the said E. O. W., one-third to the children of the said M. K., and one-third to the children of the said S. A. W., share and share alike, and in case of the decease of one of the said families of children as aforesaid, then I will and ordain that the said proceeds * * be equally divided between the two remaining families, the children of each family receiving, share and share alike, of such half to each family.” At the time of the making of the will M. K. was dead, leaving three children who survived the testatrix. S. A. W. survived E. O. W., and died many years after the testatrix. All three of the said children of M. K. pre-deceased S. A. W., two of them intestate and without issue, and one leaving two children who survived S. A. W. E. O. W. had three children, one of whom died childless before the testatrix, and the other two survived M. A. W. S. A. W. had several children, one of whom died during her lifetime leaving children, and the others all survived her

Held, that the period of distribution was the time of the death of M. A. W., and that the children of E. O. W. and M. A. W., *then living*, were entitled to the whole of the property, one moiety to each family, the members of each family sharing equally their moiety.

THIS was an action brought by Charles William Jenkins against John A. Kyte Drummond, Mary Campbell, Charlotte Coutlee, Mary Ann Henderson, and George M. Wilkinson, for the construction of the will of one Sarah Patrick.

The facts are fully set out in the judgment.

The action came on by way of motion for judgment, and was argued on November 3, 1886, before Ferguson, J.

Walkem, Q. C., for the children. The children of the daughters of the testatrix only are entitled as against the grandchildren, because all the children of one of the daughters predeceased the surviving daughter, Mrs. Wilson. The date of the death of Mrs. Wilson was the period of distribution. “ Children ” does not mean “ grand-children.”

Hawkins on Wills, 2nd Am. ed. 262 to 265; *Latta v. Lowrey*, 11 O. R. 517. This case is similar to *Smith v. Coleman*, 22 Gr. 507. See also 2 *Jarman* on Wills, 4th ed. 734, 736, 751; *McIntosh v. Bessey*, 26 Gr. 496.

Delamere, for the grandchildren. If the gift was a vested gift the grandchildren take. The two daughters took life estates with vested remainders to the children of the three families.

Geo. M. Evans, for the executor, submitted to the direction of the Court.

Walkem, Q. C., in reply. The bequest is to such of the children as survive Mrs. Wilson's death.

November 8, 1886. FERGUSON, J.—The action is brought by a surviving trustee to obtain a declaration as to the true meaning and construction of the last will of the late Sarah Patrick, who, at the time of her death was seized in fee of a parcel of land in the city of Kingston.

The will bears date the 2nd day of June, 1830. The testatrix, after providing for the raising of certain sums out of the rents and profits of the premises during the lives of her daughters named in the will, disposed of the same by a gift in the words following:

“Also I will and ordained that my said above messuage and tenement after the death of my before mentioned daughters Elizabeth Oldham Wilkinson and Sarah Ann Wilson, be sold to the best advantage, and the proceeds arising from the sale thereof be divided between the children of my daughters Elizabeth Oldham Wilkinson Mary Kyte, and Sarah Ann Wilson, in the following proportions, that is to say: one-third to the children of the said Elizabeth Oldham Wilkinson, one-third to the children of the said Mary Kyte; and one-third to the children of the said Mary Ann Wilson, share and share alike; and in case of the decease of one of the said families of children, as aforesaid, then I will and ordain that the said proceeds from the sale of the said messuage and tenement be equally divided between the two remaining families, the children

of each family receiving share and share alike of such half to each family."

The testatrix died in the year 1838 indebted to one Wilson, who in or about the year 1840 commenced proceedings in the Court of Chancery to have the property sold to satisfy his demands. In these proceedings the property was sold. Wilson was allowed to purchase. There was a surplus of the purchase money after satisfying his claim, which was directed to be invested in the name of trustees, to be held subject to the trusts of the said will. This surplus was so invested, and the plaintiff is the sole surviving one of these trustees, and the money, about \$3082.50, is now in his hands as such sole surviving trustee.

The said Mary Kyte had died before the making of the will leaving three children, who survived the testatrix.

The said Sarah Ann Wilson survived the said Elizabeth Oldham Wilkinson, and died in the month of March last (1886).

All the three children of the said Mary Kyte died before the death of the said Sarah Ann Wilson, two of them intestate and without issue, the other one having two children, who survived the said Sarah Ann Wilson and are still living: these are the defendants Mary Campbell and John A. Kyte Drummond.

Elizabeth Oldham Wilkinson had three children, one of whom died childless before the death of the testatrix. The other two survived the said Mary Ann Wilson, and are still living. One of them is the defendant George M. Wilkinson, and the other is Eliza Drummond, a widow.

Sarah Ann Wilson had eight children, seven of whom survived her and are still living. One, however, William P. Wilson died during the life of the said Sarah Ann Wilson, leaving four children who are still living.

The defendants, Mary Campbell and John A. Kyte Drummond, contend that they are entitled to a third part or share of this money as the representatives of what is in the pleadings called "the Kyte Branch." This claim is disputed by the children of the said Elizabeth Oldham

Wilkinson and Sarah Ann Wilson, who claim that none but the children of the said Mary Kyte, Elizabeth Oldham Wilkinson and Sarah Ann Wilson, who survived the said Sarah Ann Wilson, are entitled under the trusts of the will, and that as all the children of the said Mary Kyte had died before the death of the said Mary Ann Wilson, the fund should be divided between the children of Elizabeth Oldham Wilkinson and Sarah Ann Wilson, who survived the said Sarah Ann Wilson, in the proportion of one-half to each branch or family.

The children of William P. Wilson also claim that, as his representatives, they are entitled amongst them to a share equal to the share of each of the surviving children of the said Mary Ann Wilson.

The money so in the hands of the plaintiff is, in regard to the rights of the persons entitled to it, in the same position, I think, as the purchase money of the lands would have been in if the sale by process of law had not taken place, and the lands had, upon the death of Mary Ann Wilson, been sold according to the directions in that behalf contained in the will. What would, in such case, have been the rights of the claimants?

The gift of the money is to the children of the three daughters of the testatrix, one-third, share and share alike, to the children of each daughter, and in case of the death of "one of the families of children" (which I take to mean all the children of any one of the daughters of the testatrix), then the money is given to be equally divided between the two remaining families of the children of each family taking share and share alike such half to each family.

The period of distribution is manifestly the time of the death of Mary Ann Wilson who was the survivor of the two named in the will, on whose death the sale of the land should take place, and the purchase money be distributed.

The gift is to *children*. As to two of the families it is to children of persons living at the date of the will; as to the other it is to children of a person then deceased. A gift to the children of a living person will not go to his

grand-children though he may have only grand-children living at the date of the will and testator's death: *Moor v. Raisbeck*, 12 Sim. 123. A gift to the children of a person deceased who had only grandchildren living at the time will go to the grandchildren if they will take to the exclusion of the great grandchildren: *Berry v. Berry*, 3 Giff. 134; 9. W. R. 889.

A devise or bequest to the children of A., or of the testator means *primâ facie* the children *in existence at the testator's death*: provided there are such children then in existence, and the rule is the same whether the gift be of an aggregate fund to a class, or of a certain sum to each member of a class: *Hawkins* on Wills, 2nd ed., 68 & 69.

In *Jarman* on Wills 5th Am. ed. Vol. 3, p. 585, it is stated on the authority of Sir John Leach, that if a legacy be given to two or more equally, to be divided between them, or to the survivors or survivor of them, and there be no special intent to be found in the will, *the survivorship is to be referred to the period of division*. If there is no previous interest given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy. * * *But if a previous life estate be given, then the period of division is the death of the tenant for life, and the survivors at such death will take the whole of the legacy*. In the same volume at p. 588, it is said: "In this state of the authorities one need scarcely hesitate to affirm, that the rule which reads a gift to survivors simply as applying to objects living at the death of the testator is confined to those cases in which there is no other period to which survivorship can be referred; and that when such gift is preceded by a life or other prior interest it takes effect in favour of those who survive the period of distribution, and those only.

It has been laid down, that where a testator uses words of survivorship with reference to his devisees, the words ought not to be construed as referring to the event of the devisees dying in the testator's lifetime if there is any

other period to which they can reasonably be referred; *Smith v. Coleman*, 22 Gr. 510, where the learned Vice-Chancellor quotes from a judgment of Lord Justice Turner.

In the present case was given a prior interest that was tantamount, I think, to a life estate in the lands if not actually such life estate. The words in the will "*in case of the decease of one of the said families of children*" have reference, I think, to the period of distribution of the fund which was the date of the death of Mary Ann Wilson, the survivor of the daughters of the testatrix, and before this period all the children of Mary Kyte had died. It was not contended that grand-children could take directly under the word "children" in this will, and it appears clear to me that they cannot.

It seems to me immaterial to the conclusion whether the gift should be considered a vested one or one not vested, for if vested it would divest *pro tanto* upon the happening of the event mentioned in the will—the death of all the children of one of the daughters of the testatrix before the period of distribution—and I am of the opinion that the children of the two daughters of the testatrix Elizabeth Oldham Wilkinson and Mary Ann Wilson, who were living at the date of the death of the said Mary Ann Wilson are entitled to the whole of the money to be divided—one-half thereof to the children of each who will take share and share alike as amongst themselves—that is to say, each family of children will take a moiety of the fund, and the members of each family will share equally their moiety or half. The other claimants who are grand-children of daughters of the testatrix are not, I think, entitled to any share of the moneys. The judgment will declare accordingly. The costs of all parties may, I think, be out of the fund. The trustees' costs will be solicitor and client costs.

Judgment accordingly.

[CHANCERY DIVISION.]

McMULLEN v. POLLEY.

Mortgage—Custody of—Authority to receive mortgage money—Solicitor not agent to receive money.

M. desiring to raise money upon mortgage of his lands, part whereof was to go to pay off certain existing incumbrances thereon, arranged with a certain solicitor that the latter should get him the money, and he and his wife executed a mortgage for the amount, and left it in the hands of the solicitor. The latter received the mortgage money from the mortgagee and absconded. M. now sued the mortgagee, claiming the money or a discharge of the mortgage.

Held, that leaving the mortgage with the solicitor did not prove that the latter was M.'s agent to receive the money, and the defendant had not satisfied the onus resting upon him of proving this fact, and therefore M. was entitled to judgment as claimed.

THIS was an action brought by John E. McMullen against Thomas Polley, for payment of a certain sum of money, or in the alternative for the release of a certain mortgage or a reconveyance of certain lands, and further relief, under the circumstances which are sufficiently stated in the judgment.

The statement of defence set up that McMahan was agent of the plaintiff to receive the \$6,200 in question, and that in the event of the payment to McMahan not being held a good payment, there was no agreement in writing within the Statute of Frauds, which he set up as a defence.

The action was tried at Cobourg, on October 26th, 1886, before Proudfoot, J.

R. T. Walkem, Q.C., and McIntyre, Q.C., for the plaintiff. Apart from authority it would be most dangerous to hold that a solicitor negotiating a loan between two parties is the agent of the borrower to receive the money. There is no necessity in such cases for the intervention of an agent to receive the money, and therefore there can be no implied authority to the solicitor to receive it: *Ex parte Swinbanks*, 40 L. T. N. S. 825, 11 Ch. D. 525; *Gordon v. James*, 30 Ch. D. 249, 53 L. T. N. S. 641; *Gillen*

v. *Roman Catholic Episcopal Corporation*, 7 O. R. 146. Besides, in this case it was the defendant's duty to retain sufficient of the money to apply in discharge of the incumbrances existing on the lands which were to be paid off, and McMahon must have been his agent for this purpose. It is the ordinary course for borrowers to execute the mortgage before the money is paid, and they would be defenceless if the money could be paid to the solicitor. See also *Bellamy and the Metropolitan Board of Works*, 24 Ch. D. 387.

Britton, Q.C., and *Whiting*, for the defendant. In each case it is a question of fact whose agent the person receiving the money was; and here McMahon was clearly the plaintiff's agent. See *Finn v. The Dominion Savings and Investment Society*, 6 A. R. 20.

November 22nd, 1886. PROUDFOOT, J.—The plaintiff, whose land was incumbered by some mortgages, was desirous of obtaining a loan of \$6,200 for the purpose of paying them off and to have the amount not required for that purpose to use for himself.

McMahon, a solicitor told the plaintiff he had instructions from a man, the defendant, to lend money, and the plaintiff arranged with him to get it. McMahon made several appointments with the plaintiff to come to his office to meet Polley, the defendant, who was to lend the money. The plaintiff came several times but never saw Polley, and was put off by various excuses from McMahon. McMahon procured the plaintiff and his wife to execute a mortgage on Thursday, March 4th, 1886, for \$6,200 so as to save the necessity for the plaintiff's wife coming in again to sign the mortgage, and he made an appointment for the plaintiff to return the following Saturday to meet Polley. On that day the plaintiff attended, but was told by McMahon that Polley was sick, and was asked to return on Monday, the 8th of March. The plaintiff in the result, never saw Polley; never got the money.

Polley paid the money to McMahon, got from him the mortgage and had it registered on the 5th of March. On the 28th of March McMahon absconded. And the question is, which of these two innocent parties, the plaintiff or the defendant, is to suffer the loss. I think the plaintiff was an honest witness, and, notwithstanding some discrepancies in his evidence, intended to tell the truth.

When the plaintiff could not get the money that was to be advanced by Polley, he got a loan from McMahon of \$400, which McMahon said he borrowed for him, and which the plaintiff afterwards repaid by means of a note discounted at the bank, and which he has retired. And a receipt is produced, signed by the plaintiff, for this \$400, dated March 6th, as being "Re Thomas Polley mortgage," and another receipt of the same date is produced for \$89.36, the signature to which the plaintiff acknowledges to be his, but for which he is unable to account. He never received any such sum, and has no recollection of ever having signed it, and it is also said to be for money on account of the Polley mortgage. However that may be, the two sums of \$400 and \$89.36 were more than covered by the note discounted which was for \$500, and the proceeds of the discount were \$489.59 and passed to McMahon's credit. I think these matters may be laid aside in considering the case.

The question then is, whether McMahon was the agent of the plaintiff to receive the money from the defendant.

This is a question of fact, and is not proved by the mortgage having been left in the hands of the solicitor. The plaintiff denies having given any authority to the solicitor to receive the money. In this he is corroborated by his wife; both proving the several appointments made by McMahon for the plaintiff to meet the defendant, at his office, and the attendance of the plaintiff; an attendance plainly for the purpose of receiving the money.

I need not cite any other case than *Gillen v. The Roman Catholic Episcopal Corporation*, 7 O. R. 146, recently decided by the Chancellor, to shew that the custody

of a mortgage on land gives no right to the custodian to receive any part of the principal or interest ; and the case of *Viney v. Chaplin*, 2 DeG. & J. 468, to establish that the mere fact that a solicitor has in his possession a deed executed (even) by his client does not give him authority to receive the money which is the consideration for the deed. And, as the Chancellor says in the *Gillen Case*, the burden lay on the defendant to prove the agency of McMahon to receive the money, and I cannot find upon the whole of the evidence that he has succeeded in establishing that agency.

There will be judgment for the plaintiff with costs.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

MITCHELL v. THE CITY OF LONDON FIRE INSURANCE COMPANY (LIMITED.)

Fire insurance—Loss payable to M. as his interest may appear—Right to sue—Joinder—Fraudulent judicial sale—Transfer—Consent—R. S. O. ch. 162—Proofs of loss under statutory conditions—Earth oil—Condition as to keeping—“Stored or kept,” meaning of—Tug boat—Building.

G. insured a tug when navigating the rivers Sydenham, St. Clair, Detroit, and Thames and Lake St. Clair, loss, if any, payable to M., as his interest might appear. M. at the time of insurance and down to the happening of the loss was mortgagee. The tug was libelled in the American Admiralty Court, and to avoid the claim thereon G. used the proceedings therein upon a claim for wages to have a fraudulent sale thereof made to J. Afterwards G. procured a renewal of the policy without disclosing the sale, of which however defendants were subsequently notified. G., with defendants assent, assigned the policy to M., but before that assent was put in writing the tug was burned in the Chenail Ecarti, one of the channels of the St. Clair. At the time of the fire crude petroleum and earth oil were kept on the tug for lubricating purposes. M. and J. delivered proof papers of claim, which were objected to. G. did not deliver any.

At the trial leave was given to add G. and J. as co-plaintiff's, and judgment was directed to be entered for the plaintiffs for the full amount of the insurance.

Held, (1) that the action was properly constituted in the plaintiff's name alone, but that if not the joinder of G. and J. as co-plaintiffs was proper.

(2) That the sale, although not a sale by operation of law, and fraudulent, was a sale in fact, and was on being assented to by defendants binding on them.

(3) That the tug was at the time of the fire at one of the localities permitted by the policy.

(4) That the crude and earth oils, being kept for lubricating purposes, could not be said to be “stored or kept,” and that clause *f* of the 10th statutory condition did not apply. [WILSON, C. J., dissenting.]

(5) That the proofs of loss furnished were a sufficient compliance with the statutory conditions. [WILSON, C. J., dissenting.]

Per WILSON, C. J.—The proofs of loss were not sufficient, but the refusal of the defendants to recognize the plaintiff M. in any way, and their retention of the policy were an answer to the imperfect compliance with the condition requiring full particulars of the loss to be stated: but the defendants were not liable by reason of the crude and earth oils being kept on the tug.

Per ARMOUR, J.—The sale of the tug was by operation of law.

Per O'CONNOR, J.—A tug is not a “building” within the meaning of clause *f* of the 10th statutory condition.

The statement of claim was that one Gurd, on 20th June, 1883, was the owner and the plaintiff was the mortgagee of a tug boat called the *Jerome*, and the defendants on that day issued a policy of insurance on the said tug for one year against loss or damage by fire for

the sum of \$2,800 ; and the defendants covenanted with Gurd and the plaintiff that for all loss or damage by fire to the tug during the policy they would pay to the plaintiff the amount of such loss or damage, to the extent to which he should then be interested in the tug boat as mortgagee thereof.

The 3rd paragraph stated that in consideration of the further sum of \$42 paid to the defendants by the plaintiff as the agent for the then owner of the said tug boat, the said policy of insurance was duly renewed for one year from 20th June, 1884, by renewal receipt issued by the defendants' agent at Wallaceburgh.

4. That previous to the issuing of such renewal receipt, the equity of redemption in the said vessel had by operation of law passed from Gurd to one Charles Johnson in trust for Gurd ; and the plaintiff and the agent of defendants in ignorance of that fact, and by mutual mistake and inadvertence, had the renewal receipt issued as though Gurd was still the owner of the vessel ; but defendants subsequently consented, if such consent was necessary, to waive the effect of any such change of ownership upon the validity of the policy and upon their liability to plaintiff.

It was then alleged the vessel was destroyed or damaged by fire on the 3rd of October, 1884, to an extent far greater than the amount of the plaintiff's encumbrance thereon, which then amounted to \$1,910.85.

The plaintiff claimed that sum, and interest thereon at the rate of 10 per cent. per annum, and further relief.

The statement of defence set up :

1. That defendants never contracted with plaintiff.
2. That the policy was made with Gurd alone, and on his application.
3. Defendants agreed to indemnify Gurd against loss by fire of said tug, to the extent of \$2,800, when she was navigating on the rivers Sydenham, St. Clair, Detroit, and Thames, and Lake St. Clair, and in no other place or places ; and at the time of the loss by fire the tug was

not navigating in any of the places permitted by the said contract.

4. That Gurd falsely and fraudulently, at the time of the insurance, represented the tug to be of the cash value of \$3,500, whereas she was not then of greater value than \$1,600, as Gurd then well knew ; and he made that representation as a warranty and as the basis of the contract, and defendants, believing the representation of value to be true, entered into said contract.

5. That on 1st February, 1884, the tug was sold by public auction for \$1,600 to one Charles Johnson, and Gurd ceased to have any interest or property in the tug, which sale was a circumstance material to be made known to defendants within the meaning of said condition [set out in the paragraph], but Gurd and Johnson wilfully withheld from defendants all information in reference thereto, and the interest of Johnson was not stated in the policy or renewal thereof, and afterwards on the 20th of June Gurd represented to defendants he was still owner of the tug, and defendants believing same to be true renewed for him said policy for one year from that date, which they would not have done if the sale had been disclosed to them ; and by reason of the omission and misrepresentation, and the misrepresentation stated in the fourth paragraph, the insurance ceased to be valid at the time of said sale.

6. (After setting out a condition of the policy) that the said sale was voluntarily made or consented to, or allowed without opposition by the assured on the 1st of February, 1884, for the purpose of evading a claim for damages against the tug arising out of a collision in the Detroit River, and was a change material to the risk within the knowledge of the assured, of which no notice was given to the defendants, until after the fire in the claim mentioned ; and no permission was given by defendants or their agent to such sale, and the insurance contract thereby became void.

7. That by the policy there could be no abandonment by the insured if the loss was only partial, unless by consent of the company or their agent, and no such consent was given; and if the defendants were found liable to plaintiff, as mortgagee, plaintiff should, as the vessel was only partially damaged, first realize on the salvage in reduction of his claim before applying to defendants to pay the same.

8. That it was a term of the policy that defendants should not be liable for loss occurring while petroleum, rock, earth, or coal oil, burning fluid, naphtha, or any liquid product thereof, or any of their constituent parts [refined coal oil for lighting purposes only, not exceeding five gallons in quantity, excepted], were stored or kept, or contained on the property insured, unless permission was given by the company in writing, and the defendant said there was, without the permission of the company, or their knowledge or consent, kept stored and contained in the tug more than five gallons of refined oil, coal oil, and rock and earth oils, and their liquid products, at the time of the fire, whereby defendants were released from their liability for loss.

9. That (setting out the 12th and 13th statutory conditions) the assured did not give notice in writing to defendants of the said loss, nor provide any proof-papers of loss, which were a bar to the action; but if it should be held proof of loss was given by or on behalf of the assured, which defendants denied, then that within a reasonable time after receiving the same they notified the party furnishing such proof without prejudice to their rights, giving the particulars wherein they were defective; yet said proof had never been completed, and they claimed the benefit of the 17th statutory condition as a bar to the action.

10. That contrary to the terms of the policy there was fraud and false swearing in the proofs of loss, if such proofs were given as to the ownership of the tug, the value of the same, and the amount of the loss, whereby defendants were relieved from liability.

11. Defendants denied they ever consented to any change of ownership of the tug by writing or otherwise, or that they waived any of the conditions of the contract; but if it should be held there was a verbal waiver or consent, then that by a just and reasonable addition to the statutory conditions printed in the manner the Act required, it was provided the company would not be bound by any verbal understanding; and also that no condition of the policy in whole or in part should be deemed to have been waived by the company, unless the waiver was clearly expressed in writing, signed by an agent of the company.

Issue.

The action was tried at the last Fall Assizes, held at Chatham, before Armour, J., without a jury.

The application for insurance and the policy made the loss, if any, payable to the plaintiff, as his interest should appear.

The plaintiff paid the renewal premium on 24th June 1884.

It appeared the name of the vessel was stated in the policy to be the *Jennie* in place of the *Jerome*, and plaintiff asked Mr. Gillard, the agent, at Wallaceburgh, of defendants, to have it corrected. The agent sent the policy to the company on 6th September, 1884, and in that letter the agent informed the company, "The boat has changed ownership since the policy was issued. She is now held in the name of Charles J. Johnson, but Dr. George Mitchell is still mortgagee. You would oblige the Dr. and myself very much if you will issue policy as above requested;" that is, to him, as requested. The request so made was stated in the letter as follows: "The doctor would also like the policy issued to him direct as mortgagee: he holds the policy and paid the last premium." The company, by Mr. Maguire, the general agent, wrote on the 9th of September:

"I regret I am unable to issue policy in Mr. Mitchell's name, as mortgagee, as the company does not issue policies in that way. I have filled in the assignment blank on the

back of the policy, and return to you for Mr. Gurd's signature, which please secure and return to this office for our consent."

The assignment so filled up was as follows :

"For value, I hereby transfer, assign, and set over unto Charles J. Johnson, purchaser, and his assigns, all my right, title, and interest in this policy of insurance, and all benefits and advantages to be derived therefrom, subject to mortgage of George Mitchell, M.D., to whom loss, if any, is to be payable, as his interest may appear.

"Witness my hand and seal this 20th day of September, 1884,

"GEORGE G. GURD. [L.S.]"

Signed, sealed, and delivered in presence of

GEORGE MITCHELL.

On 2nd October, Gillard wrote to the general manager :

"Re Pol. 41,697. Geo. G. Gurd. I herewith hand you the within policy to have your consent attached, which please do, and return to me at once."

On 4th of October, Gillard wrote a postal card to the general agent :

"Tug Jerome. I have just heard that this boat was burnt on the River St. Clair. I can't say how true it is, as it is only rumour, but am inclined to think it is true. Will let you know particulars as soon as possible."

On 4th October the general agent wrote to Gillard :

"Your favour of 2nd to hand, with policy 41697 (Gurd) for consent to the assignment to C. J. Johnson. Kindly forward endorsement for counterfoil."

On 7th October the general agent wrote to Gillard :

"Re policy 41,697. I am in receipt of your favour of 6th inst., with fifty-five cents enclosed as fee for consent to assignment of Gurd to Johnson, but to which we are not prepared to give our assent. It appears that by a former letter the mortgagee stated that the insurance was for his benefit only, and asked for a policy in his own name as mortgagee. This in my absence was refused and the matter only now comes before me on my return, and in

connection with your letter regarding this endorsement. The policy should be in the name of the mortgagee only, and although the amount of insurance is much larger than his interest, still we have no objection, and I have given instructions to issue a new policy for one year from the original date of issue. I therefore return the fifty-five cents for endorsement fee, as it is not chargeable."

On 7th October Gillard telegraphed to general agent :

"Yes, *Jerome*, four, one, six, nine, seven, burnt."

On 8th of October the general agent wrote to Gillard :

"Re insurance on the tug *Jerome*. Late last evening after I had left the office, your telegram arrived as follows, viz : 'Yes, *Jerome*, 41697, she is burnt.' I wrote you fully yesterday *re* this insurance in name of George Mitchell as mortgagee, and regret to learn we shall suffer a loss on this tug. The matter will receive our prompt attention, and you will be further advised in a day or two.

P. S. Where was she when burnt ? Kindly obtain full particulars."

On 11th October the general agent wrote to Gillard :

"Replying to your favour of 10th inst., I regret to learn the unpleasant information in regard to the burning of this tug ; more especially while the question of insurance was in an unsettled condition, for you must be aware that the change of ownership without our consent practically vitiated the insurance ; and the complication in this instance is greater from the fact, which you stated in a recent letter, that the insurance was kept in force by the mortgagee for his own benefit. However, we shall be glad to receive the full particulars as soon as you will be able to obtain the same."

On the 14th October the plaintiff wrote to the general agent :

"I beg to notify you that the tug *Jerome* is burnt, and that I have a claim on policy 41697 of insurance in your company on mortgage."

On the 17th October, the general agent wrote to the plaintiff :

"I am in receipt of your favour of the 14th inst. notifying me of the burning of the tug *Jerome*, in which you are interested. My own impression is that you are the only one interested or in any way concerned."

On the 22nd October the general agent wrote to Gillard :

"Enclosed please find policy to Mitchell as requested in your favour of 6th September, and as advised in one of 7th inst., would be done. You will observe that by this policy the former policy, which purported to have been renewed on the 20th June, expired, but you have not returned us the renewal receipt. You will please deliver this policy to Doctor Mitchell on his handing you the renewal receipt, but in no case will you part with this policy without obtaining the renewal receipt which you will at once return to this office."

On the 31st October the general agent wrote to Gillard :

"Referring to my letter of 22nd inst., when we forwarded to you policy No. 151,651 in name of Mitchell, as mortgagee, we gave you certain instructions in regard thereto. I am in receipt of your favour of 30th inst., in which you make no reference to the contents of the above letter. This I must point out to you is not, to say the least of it, courteous on your part, as agent. You will be good enough to either obtain the renewal receipt for policy 41,697 from Dr. Mitchell handing him the new policy and returning the receipt to us, or you will at once return policy No. 151,651 by registered letter. I would point out to you that Mr. Mitchell cannot make any claim under policy 41,697, even though it were all in order, as he is merely there declared to be the mortgagee, and the company can have no dealings whatever with him, other than to acknowledge the receipt of the document which you have forwarded from him, in the form of a notice that his interest in the property formerly insured under policy 41,697 amounts to the sum of \$1,910.85. I regret that Dr. Mitchell should have taken the position he has, as the policy at the time of renewal was void by the fact that the property had been disposed of some months prior to the expiration of

the policy, and on my return, when the matter was brought before me, and to protect Dr. Mitchell's interests, you having informed us that he had actually paid the premium, we agreed to issue the policy to him, as mortgagee. He stated in the document which you forwarded to us that you have refused to return the policy No. 41,697. We have not done so: what we did do was to refuse to consent to the assignment, or to transfer the policy from Gurd to Johnson. One reason why we did this was, that if the insurance was only to protect the mortgagee, we do not wish him to be placed in the position of having his policy vitiated by the acts of others; and it is also possible that Johnson, whom we understand is an American living in Detroit, had the tug insured there for his own benefit, so that you see the matter is unfortunately complicated. Had Mitchell accepted the new policy it would have enabled us to deal with him direct, and close the matter without loss of time. As he has, however, decided not to do this, you will kindly return policy 151,651 forthwith, and you may inform Dr. Mitchell that if any money should be found to be due under policy 41,697, we shall certainly not pay it over until his claim has been satisfied, and this you will kindly state to him is without prejudice."

On 6th February, 1885, the general agent wrote to Gillard:

"I am in receipt of your favour of 31st ult., re policy 41,697, Gurd, and note your remarks, for which I am much obliged. Anything you did in the matter, you did as the agent of the company, and when the policy was placed in your hands it was placed in the keeping of the company. It is quite safe with us and we intend to retain it until some satisfactory outcome be arrived at. The matter must remain in *statu quo*, as it was at the time we were advised of the loss."

On the 27th February, the general agent wrote to the plaintiff:

"Referring to a declaration of yourself in regard to loss under policy 41,697, Gurd—loss payable to you—I learned

in rather a peculiar way that it is perhaps possible that you are contemplating a suit against the company. Permit me to quote an extract from my letter to our agent in reply to his, when he enclosed the said declaration made by you as to the loss of the *Jerome* by fire. It is as follows: 'I would point out to you that Mr. Mitchell cannot make any claim under policy 41,697, even though it were all in order, as he is only declared to be the mortgagee, and the company can have no dealings whatever with him other than to acknowledge the receipt of the document which you have forwarded from him in the form of a notice that his interest in the property insured under policy 41,697 amounts to the sum of \$1,910.85.' I would also quote as follows, viz.: 'He states in the document which you forward us that we have refused to return the policy No. 41,697. We have not done so. What we did was to refuse to consent to the assignment, or to transfer the policy from Gurd to Johnson.'

"I will now, in view of the possible contingency that you may be about to enter into an action at law claiming a loss under the policy referred to, and without admitting any liability whatever, and without prejudice to any defence we may have to any claim made upon us under said policy by any one whatsoever, and not intending hereby to waive any of the conditions in the policy, all of which we desire to be strictly complied with, we beg to notify you that we object to the declaration sent by you on the 29th of October last, as we have already objected to other so called documents in support of a claim by other parties, and to whom we then pointed out, as we now point out to you, that they were insufficient, and that under the statutory conditions in the Policy Act, and which, with certain variations, were the conditions of the policy issued on the said tug, we object to any claim being made by any person other than the assured, and, in case of absence or inability, by his agent, who must satisfactorily account for such absence or inability, and the requirements laid down in the statutory condition No. 13,

must be fully complied with. And it is hardly necessary for me to point out that this bald declaration is unaccompanied by the necessary proof of loss, certificate of magistrate, notary public, or clergyman, and such books of account, invoices and other vouchers, and an exhibit of the remains of the property which was covered by the policy as would, if we admitted any claim and the company were liable, be necessary to enable us to arrive at the amount of the damage or loss to the property insured. While therefore, as I have before stated, not admitting any liability and distinctly declaring that this letter to you and all our acts are without prejudice to all our rights, and without waiving any of the same, we shall, if you desire to make a claim, require all the conditions already referred to fully complied with, and for your guidance only I forward you one of our claim papers, which sets forth what is required by the condition of the policy and are binding upon any one making a claim."

Gillard, in his evidence, said that the sum to be insured he thought should be about \$2,300, but he and Gurd agreed upon \$2,800 : he had considered her value for from \$3,500 to \$4,000. Gurd said he thought her worth more than the \$3,500 he paid for her : he thought the claim a just one, and advised the company to pay it.

The other facts of the case sufficiently appear in the judgment.

The learned Judge found against the defendants on the 4th, 5th, 6th, 7th, 8th and 10th paragraphs of their defence.

The sale to Johnson, he was of opinion, did not avoid the policy, as the transfer under the process of the Maritime Court was by operation of law ; and the defendants having consented in fact to the transfer, they could not withdraw that consent ; and particularly as it was not withdrawn until after the loss by fire, and after they had induced the parties interested to act upon the belief that the transfer was assented to ; and Johnson thus became the assured, and as such, properly sent in the proofs of

loss; but if not, that, from the dealings between the plaintiff and the defendants, the relationship of *cestui que trust* and trustees was created, so that he could claim the money in his own name; but if the plaintiff could not sue in his own name, and Johnson could not do so either, Gurd could do so for the benefit of the now plaintiff; but if Gurd was to be considered as the assured it might be urged he could not sue, because he had not furnished any proofs of loss; that that defence the defendants should not be allowed to set up, because it would be inequitable in the company to set up an imperfect compliance with the 12th and 13th statutory conditions under the circumstances; and accordingly the learned Judge gave judgment for the plaintiff for \$3,010 and costs.

Gurd and Johnson respectively consented to be made plaintiffs and they were ordered to be made parties as such to the action.

At the last Easter Sittings notice was given that defendants would move to set aside the judgment for the plaintiff and enter it for defendants; or for a new trial, or for other relief, upon the grounds:

1. That the judgment was contrary to law and evidence, and the weight of evidence.

2. That Mitchell could not sue in his own name, and the names of Johnston and Gurd were improperly added as plaintiffs, and that none of them could recover for the following reasons.

3. That Gurd concealed from the defendants upon his application for insurance the facts that the *Jerome* had been libelled in the American Admiralty Court, and that her freedom was at that time allowed only upon security being given for her return.

4. The *Jerome* was not in any of the localities at the time of the fire permitted by the policy.

5. The learned Judge should have held the assured falsely represented in his application the tug was of greater value than it really was.

6. The tug was sold and assigned on the 1st of February, 1884, without the knowledge or permission of the defendants, as required by the statutory conditions, and the policy thereby became void.

7. At the time of the fire Gurd, the assured, had no property in the tug.

8. When the fire occurred there was without the knowledge or permission of the company petroleum, rock, earth and coal oil, and the liquid products and constituent parts thereof, stored and kept on the tug.

9. The policy was prior to the fire assigned by the assured to Johnson without the requisite permission of the company.

10. The lien on the tug by the crew for wages was a claim prior to that of a mortgagee, and by the sale of the 1st of February, 1884, to satisfy such lien, the rights of Mitchell, the mortgagee, on the tug were gone, and at the time of the fire he had no interest in her.

11. On 24th June, 1884, Mitchell, the mortgagee, as agent of the assured, renewed the policy without disclosing to the company the sale to Johnson, and the real interest of Gurd in the tug was not stated in or upon the policy.

12. The sale by Gurd was a voluntary sale on his part, in which he used the proceedings of the Maritime Court to vest in the purchaser a title free from the cloud upon the tug by reason of the libel against her in the American Admiralty Court, and as between Gurd and Johnson it was a valid sale.

13. It was established by the evidence that the insurance was effected in consequence of the proceedings taken against the tug, and in contemplation of a change of ownership to defeat the claimant in those proceedings.

14. The learned Judge gave judgment for more than was claimed in the action ; and if Johnson and Gurd were added as plaintiffs the recovery should have been for the amount of the claim of Mitchell only.

15. Plaintiff's cause of action had not accrued when the action was commenced, as no proof papers had been given

by the assured, and defendants had not disentitled themselves in any way to a strict compliance with the 12th and 13th statutory conditions.

16. The proof papers of loss delivered to the company did not comply with the requirements of the 12th and 13th statutory conditions, and the company was not estopped from and did not waive the strict compliance with those conditions.

17. And upon other grounds appearing in the evidence, exhibits and pleadings.

Robinson, Q. C., and *Millar*, supported the motion. The vessel was insured against loss by fire to navigate certain named rivers and Lake St. Clair ; and she was burned in the *Chenail Ecarti*, which is said not to be any of these waters.

The sale to Johnson in the Maritime Court was a fraud to evade the 4th condition of the policy against assigning without the consent of the company, under the pretence that it was a sale by operation of law ; but it cannot have that effect, as it was done in fraud for the purpose just stated : *McDonald v. Crombie*, 2 O. R. 243, 11 S. C. 107 ; *Doe Mitchenson v. Carter*, 8 T. R. 300.

Mitchell knew no more of the sale than the defendants, who knew there had been a sale, but not the mode or particulars of it.

The plaintiff's title, as mortgagee, if valid in other respects, is not cut out or affected by the proceeding in *rem* against the vessel : 40 Vic. ch. 21, sec 2, sub-sec. 4, amended by 42 Vic. ch. 40, sec. 1 (D.)

Mitchell, though mortgagee, is not entitled to maintain this action : *McQueen v. Phœnix Mutual Ins. Co.*, 4 S. C. 660 ; and as he cannot bring the action, and has brought it alone, he cannot be enabled to maintain it by having parties added to it who should properly have brought the action in the first instance : *Peek v. Spencer*, L. R. 5 Ch. 548.

The assured is required to furnish the proofs of loss, and he has not done so, nor has he given the required proof. The proofs of loss, such as were furnished, were given by Johnson, but he was not the assured.

The defendants, on receiving the proofs from Johnson on the 17th November, took objections to them on the 24th November. Mitchell made a declaration of loss about the 29th October, and the defendants objected to his claim, and he is not the assured. The ship had two gallons of black oil on board.

The authorities are very plain and strict as to the particulars of loss which are required to be furnished: *Greaves v. The Niagara District Mutual Fire Ins. Co.*, 25 U. C. R. 127; *Mulvey v. Gore District Mutual Ins. Co.*, *ibid.* 424; *Banting v. Niagara District Mutual Ins. Co.*, *ibid.* 431; and there were no particulars, but only a general statement of loss.

W. R. Meredith, Q.C., shewed cause.

Mitchell had the right to sue alone for the amount of his claim, as the money was payable to him by the policy: *Bank of Hamilton v. Western Ins. Co.*, 38 U. C. R. 609; *Dear v. Western Ins. Co.*, 41 U. C. R. 553. As to proofs of loss, see R. S. O. ch. 162, sec. 2; *Robins v. Victoria Mutual Fire Ins. Co.*, 31 C. P. 562, 6 A. R. 427.

The defendants objected to the proofs of loss because of their not being a proper compliance with the conditions, and not because they were furnished by the wrong person, and they have a proper knowledge of all the particulars by the personal inspection of their own special officer. The objections they took were fully answered, and they did not take further objection. There were two gallons of black oil on board. As to the place of the burning, it was on a part of the River St. Clair; *Grant v. Aetna Ins. Co.*, 6 Lower Can. Jur. 224.

The sale in the Maritime Court did not require to be set aside; it was in no sense a valid proceeding; and besides Mitchell had no knowledge of any of the proceedings. *Freeman on Judgments*, 297; *Duchess of Kingston's case*, 2 Sm. L. C. 784.

Gurd and Johnston were rightly added as plaintiffs : *Jesson v. Gardiner*, 11 Grant, 23. The defendants have not pleaded the libelling of the vessel in the American Court.

In *Sauvey v. The Isolated Risk & Farmers' Fire Ins. Co.*, 44 U. C. R. 523, a subsequent insurance without notice to the company, under a covenant by the mortgagor, the insured, to insure, made by the mortgagee in the mortgagor's name, without notice to the company, was held not to be a breach of the condition in the first policy.

The libelling of the vessel was not material to the risk.

Johnson became a trustee for Gurd. No claim was ever proved in the American Court against the vessel. If the transfer to Johnson has any effect it is by operation of law, and then it is saved by the terms of the condition.

Robinson, Q.C., in reply. The statutory conditions should not be construed most strongly against the company. The company were entitled to have the proof of loss properly put in, no matter what the company may otherwise have known.

The particular oil used for lubricating was dangerous, because the rags or oakum used in oiling are apt to take fire.

The case of *Doe Mitchenson v. Carter*, 8 T. R. 300, expressly applies to the transfer to Johnson, and that transfer avoided the policy.

December 23, 1886. WILSON, C. J.—There has been so much argued against the right of the plaintiff to recover, and so much has been set up against it in the statement of defence, in the correspondence, in the evidence, and in the notice of motion, that it is necessary to determine what matters there are we have to consider in finally disposing of the case.

I may take the notice of motion as containing the statement of everything which can be said against the judgment which has been moved against. I shall therefore take the grounds severally as they are there set out,

and compare them with the pleadings, to see how far they are admissible, and when those which are admissible are ascertained, to consider how they are supported or supportable by the evidence of the witnesses and the testimony produced at the trial.

The 3rd objection in the defendants' notice of motion, that the fact of the libelling of the tug in the American Court was not communicated to the defendants, is not pleaded, although the defendants by the 6th paragraph of defence were aware of it.

The 10th objection in the rule, that the lien of the crew for wages was a prior claim to that of the mortgage of the plaintiff, and that by the sale to satisfy the lien for such wages the plaintiff lost all his rights as mortgagee against the tug, has not been pleaded; but besides that the 42 Vic. ch. 40, sec. 1 (D), preserves to the mortgagee his rights as against the claim for wages.

The 13th objection, that the insurance [of June, 1884], that is, the renewal of the policy, was effected in consequence of the proceedings which had been taken against the tug, and in contemplation of a change of ownership to defeat the claimant in these proceedings; that is, I presume, to defeat the claimant in the proceedings in the Admiralty Court—is not pleaded, and although true, it is of no consequence. It shewed, at most, it was a fraudulent proceeding, and whether fraudulent or not does not matter, for there was a sale in fact made, and that answers all the purposes of the defendants under their other pleadings. I may therefore deal with the exceptions in the notice of motion, omitting for that purpose the 3rd, 10th, and 13th exceptions, and there will still remain fourteen to be considered, and probably these will be, as they ought to be, sufficient to vindicate the defendants' rights.

The first objection is that the verdict is contrary to law, evidence, and the weight of evidence. If so, that will appear in the remaining objections.

The second objection is, that Mitchell cannot maintain this action in his own name, and Johnson and Gurd were

improperly made parties at the trial, and that none of them can recover for the reasons before stated.

In the case of *McQueen v. The Phoenix Ins. Co.*, 4 S. C. at pp. 703, 704, Gwynne, J., was of opinion the words "loss, if any, payable to" third party, did not enable that third party to sue in his own name for the amount of his claim covered by the policy; but that the action for all loss under such a policy must be sued for by the assured, and he referred to *McCallum v. The Ætna Ins. Co.*, 20 C. P. 289, where even on a marine policy such third party could not sue in his own name.

What the *interest* of the plaintiff in that case was does not appear; that is, it does not appear whether he was mortgagee of the vessel, or whether his interest in the amount payable upon a loss was by reason of his being a creditor only of the assured. There is nothing, in fact, said of his interest. The insurance was on account of Alfred Coons, "loss, if any, payable to Lachlan McCallum," the plaintiff. In this case the insurance is on the vessel, "loss [if any] payable to George Mitchell, M.D., of Wallaceburg, as his interest may appear;" and the interest of George Mitchell, the plaintiff, at that time was as mortgagee of this insured vessel, which mortgage he obtained on the 21st of March, 1881, from the former owner, Susan McDonald, on 32 shares of the tug. Henry Charles Misner owned the other 32 shares.

On the 9th of June, 1883, Misner sold the whole 64 shares to Gurd. Misner must have acquired Mrs. McDonald's 32 shares before he sold the whole vessel to Gurd. Gurd, then, owning the whole 64 shares, gave the present mortgage on the 20th of June, 1883, upon the whole vessel to the plaintiff, the same day on which he obtained the policy now in question.

The *interest* of the plaintiff, referred to in the policy, is his interest as mortgagee, for although the fact of his being mortgagee is not stated, it may be averred under the term, "as his interest may appear."

According to the authorities referred to in *McCallum v. The Aetna Ins. Co.*, if the words of the policy are "for himself and whom it may concern," or "for whom it may concern, or shew some indication of the interest of another party than the one named;" and that "such words, or equivalent ones, are introduced into the policy, the rules of law then authorize extrinsic evidence as to those who are parties in interest, and who may enforce their claims, though not particularly named therein."

Now here it plainly appears the words of this policy, "loss (if any) payable to Geo Mitchell, as his *interest* may appear," do *contain an indication of the interest of another party than the one named*, and are equivalent words to those above referred to.

There are no words in the policy that the *risk* is insured or taken for any one other than Gurd; but I do not think that can make any difference, because it appears he was providing for the *interest* which Mitchell had as well as for his own interest. Gillard said the insurance was effected at the instance of both Gurd and the plaintiff.

In *Watson v. Swann*, 11 C. B. N. S. 756, the words there were: "The risk to be valued and declared when ascertained." The person suing, not being the one named in the general policy, it was held could not recover because he had no interest at the time that general policy was issued and not until long afterwards, and it had not been taken out either by or for him. I refer to that case to shew it was *the risk* which was to be valued and declared.

The fact that the plaintiff was mortgagee of the vessel before and at the time of the granting of the policy gave him a direct interest in the risk; and by that mortgage it is declared the plaintiff may exercise the power of sale upon default, but not before the 9th of June, 1884, which is given by the Imperial Merchant Shipping Act 1854, see section 71, and see also 36 Vic. ch. 128 sec. 42 (D.)

The case of *The Sunderland Marine Ins. Co. v. Kearney & Noonan*, 16 Q. B. 925, shews the plaintiff may sue on this policy. In that case the policy was by deed, and

Lord Campbell said : “ It was admitted that he” (Noonan, whose name was not mentioned in the policy) “ might have joined in the action had the policy not been under seal. * * But it cannot be meant that his name of baptism and his surname must necessarily be set out. If he be sufficiently designated in the deed, this must be enough to entitle him to sue for breach of a covenant to pay money to the person so designated. Kearney” [in whose name the policy was] “ is not represented by the policy as the only person with whom the company contracts. The introductory words are, that Kearney had represented to the company ‘ that he was interested in or duly authorized as owner, agent, or otherwise to make the assurance.’ Although he had such authority there was nothing to prevent the company from entering into a covenant to pay the loss to the persons who were naturally interested in the subject matter insured, and on whose account the policy was made.”

That case goes the full length of this case, and that was a contract under seal, in which the rule of the parties to sue upon it was more strictly construed than on a mere written contract, which this is, and as Lord Campbell said, “ There is no reported decision on this point, because the objection has never before been taken.”

That judgment was given by Lord Campbell, Patteson, Wightman, and Erle, JJ., and upon that decision I may safely say the plaintiff is entitled to bring this action alone ; and I should say, also, with Johnson ; for if the vacating of the purchase would make any difference, that was not effected until the 4th January, 1886, and this action was begun on the 19th February, 1885, and tried the first time at the assizes, on the 18th April, 1885, and the last time on the 6th May, 1886.

It is also said in *May on Insurance*, sec. 446 : “ If the Insurance Company promise the assignee to pay him he may sue him in his own name, and the consent to an assignment has been held to be equivalent to a promise to pay ; and so if the loss is made payable to a third person.” See

also *Parsons* on Insurance, 2nd Vol. 459 to 462. But if not, and if the effect of avoiding the sale to Johnson is to revest the vessel in Gurd, as if the sale to Johnson had not taken place, then Gurd may be properly joined with the plaintiff. I think the action properly constituted in the plaintiff's name alone.

The fourth objection is, the *Jerome* was not at the time of the fire in any of the localities permitted by the policy.

The policy is upon "the tug to navigate the rivers Sydenham, St. Clair, Detroit, and Thames, and Lake St. Clair."

The place of the burning is stated precisely in the notes of the evidence. It was, however, either in what some call the Snye Carty, and others call the Sydenham River. The *Snye Carty* is a name pronounced as I have now written it. The proper name is *Chenail Ecarti* or *Chenal Ecarti*. *Chenal* is pronounced, according to the dictionary, *Sh-nal*, and means, as the word indicates, a *channel*, and *Ecarti* is *out of the way, lonely, lost*. The name altogether meaning *an out of the way channel*.

The real questions then are, what waters constitute the Snye Carty? and is the Snye Carty a distinct water from the river St. Clair?

Some of the witnesses call it a *river*, and some a *channel* of the river St. Clair. The plaintiff said the vessel was burning in one of the channels of the river St. Clair, the Snye Carty.

Malcolm McDonald, a witness for the plaintiff, says in cross-examination:

Q. You know where the Snye Carty is? A. Yes, it is a branch of the river St. Clair, it is one of the outlets of the river St. Clair.

Q. The Snye Carty is a distinct river from the Sydenham? A. Yes, the Sydenham empties into it.

Q. Is it not part of the water of St. Clair? A. Yes, there are two channels.

Q. Does the water of the river St. Clair run into the Snye Carty? A. Yes.

Q. And again into the river St. Clair? A. Yes.

Q. The bulk of the water from the St. Clair river does not pass through the Snye Carty? A. No; all the water that passes through it comes from the St. Clair river; there is no other supply to it. [That was a mistake; he had just said the Sydenham river empties into it; but that was some distance down from the point where the Snye Carty begins.] "I call it a branch of the St. Clair."

W. H. O'Neil, a witness for the defendants, in his examination in chief, said:

Q. You know the Snye Carty? A. Yes.

Q. Is that a distinct river from the Sydenham? A. I think so.

Q. And from the St. Clair? A. The river St. Clair feeds it.

Q. Is it a distinct river from the St. Clair? A. Judging from the names they are distinct.

Q. Distinct from lake St. Clair? A. Yes, it empties there.

Gurd, in his examination before the trial, said: "The Chenail Ecarti is a distinct river from the Sydenham, it is one of the channels of the St. Clair."

And Johnson, in his claim papers, said:

"The tug was destroyed by fire on or about the 3rd of October, 1884, in the river Chenail Ecarti."

The map compiled by Charles Rankin, P. L. S., in 1847, from the maps in the Surveyor-General's office, shews the river St. Clair, when it reaches Walpole Island, separates into six different channels—the North Channel, Turtle Channel, Eagle Channel, the Main Channel, the dividing one between our own and the American shores, the Snye Carty, and another between Walpole and St. Anne's islands, which has no name, probably because it is too small, or too shallow, and after passing these islands the whole waters of the river St. Clair empty into the lake.

The Snye Carty is the first channel that branches off from the river. It flows for some distance along the eastern shore of Walpole Island, and when it reaches the

north part of St. Anne's Island, it flows for some distance along the north-east part of that island where it is joined by the Sydenham river, which, as the witness said, empties into the Snyc Carty. It was said at the trial that after the Sydenham joined the Snyc Carty, the stream from there to the lake was called the Sydenham river, but that does not agree with the testimony of the witness who said the Sydenham emptied into the Snyc Carty. In the Crown Land Department the Snyc Carty extends from its departure from the River St. Clair till it falls into the lake, carrying along with it the waters of the Sydenham river. If that be so, and the evidence quite sustains it, then the Snyc Carty must be deemed to be a part of the river St. Clair, for there is no possibility of reaching the Sydenham river, which the tug was permitted by the policy to navigate, but by and through the Snyc Carty. The learned Judge said that that part of the defence was not much relied upon. That objection cannot be sustained.

The fifth objection was, the learned Judge should have held the assured falsely represented in his application that the tug was of greater value than it really was. The application represented the cash value of the tug to be \$4,200.

[The learned Chief Justice then considered the evidence as to value, and continued.]

I do not think that issue should necessarily, nor perhaps properly, be found for the defendants. I must decide against that fifth objection.

The sixth objection is the tug was sold on the 1st of February, 1884, without the knowledge or permission of the defendants, as required by the conditions, and the policy thereby became void, and it should have been so found. In fact the tug was sold and according to the evidence of Gurd it was a fraudulent sale, made on a claim of wages by one of the men on the boat, whose wages were left purposely in arrear to the amount of \$100 to enable proceedings to be taken in the Maritime Court to bring about a sale.

The real purpose was to defraud the party who had before then libelled the vessel in the American Admiralty Court on a claim for collision, and not to change the property. It cannot be called a sale by operation of law, and it was in effect a sale by Gurd to Johnson.

The vessel on being libelled was released upon bonds being given for her surrender, and the sale so made was afterwards set aside by the Maritime Court for the fraud, and the abuse of the process of the Court to effect the fraud.

Johnson's name was used without his knowledge as the purchaser of the boat at the sale, and his title as owner was afterwards duly registered in the Customs' Department at Montreal. There is no doubt it was a fraudulent transaction. The plaintiff had heard something of the sale, but he knew nothing of the facts, and he said he had no proof of it. There appeared to be a doubt about it. Gurd told him of it shortly before he, the plaintiff, spoke to Gillard about getting the consent of the company endorsed upon the policy to the transfer that had been made. The plaintiff thereupon got Gurd to endorse an assignment to Johnson and then gave it to Gillard.

The sale, fraudulent though it was, to Johnson, was a sale in fact, and might have had the effect of avoiding the policy as if it had been a *bonâ fide* sale.

An assignment, if fraudulent as against creditors, avoids the policy: *Wood* on Insurance, sec. 322; *May* on Insurance, sec. 264. There, however, the sale is valid in law as between vendor and vendee; and I do not see any substantial difference between such a case, and the proceedings taken to complete the transfer to Johnson, and the transfer so made to him, because it was intended by the vendor to have the effect to defeat the claimant in the Admiralty Court. In each case the transfer is valid between the parties.

The question is whether all the proceedings taken to bring about the sale, and a sale of the kind being made, is not equally binding on the defendants as if they had been

informed of the fraudulent nature of the transaction, or as if the sale had been a *bonâ fide* one, when they certify it by their subsequent act.

I think it is so; for it is *the sale in fact* they assent or submit to, and not the sale of any particular character, honest or fraudulent, as the case may be. The insurers are probably less affected by the fraudulent than by the *bonâ fide* sale; for in the latter case the possession, in fact, is sure to be changed; while in the former case the possession is very probably not changed; and it is the change of ownership, the substitution of the person they had elected to insure, for a person they had not agreed to insure, which they require to be informed of, in order that they may decide whether they will continue their engagement with the new owner which they had made with the former owner.

The question is, did the defendants ratify and adopt the sale that was made to Johnson?

On the 6th September, 1884, Gillard wrote to the defendants the boat had changed ownership since the policy was issued; that Charles J. Johnson now owned the boat and that the plaintiff was still mortgagee.

The plaintiff had paid the renewal premium in June, 1884, and in September he wanted the company to give him a policy in his name as mortgagee, and he sent the policy then to the defendants to be corrected, as the *Jerome* was wrongly called in the policy the *Jennie*. On the 9th of September the defendants not approving of issuing a policy to the plaintiff as mortgagee, filled up the blank form of assignment on the policy from Gurd to Johnson, and then sent the policy on for Gurd to sign it, which he did. The defendants had then to assent to that assignment, and they asked the policy to be returned to them for their assent. On the 2nd October, Gillard, after getting Gurd to sign the transfer of the policy to Johnson, sent it on to the defendants to get their signature to the consent to the assignment.

On the 4th October Gillard sent a postal card to the defendants he had heard the vessel was burned, and on the same day the defendants wrote to Gillard acknowledging the receipt of the policy, and telling him to send the fee for the consent to assign. Gillard sent the fee, 55c., which the defendants, in their letter of the 7th October, acknowledged, and in it the defendants say the policy to the plaintiff as mortgagee, which was before refused to be given to him while the general agent was away, will now be given to him, and the 55c. sent for the assignment was returned. The postal card of the 4th October up to that was not acknowledged, if it had then been received. It was suggested that the letter of the general agent of the 7th October, agreeing to give the policy to the plaintiff as assignee, was written with a knowledge the defendants then had of the fire. It is certain Mitchell did not afterwards take the policy in his own name, for he was advised such a policy given *after* the fire would be of no value to him.

On the same day, the 7th October, Gillard telegraphed to defendants the vessel had been burned; and on the 8th October the defendants received that telegram and the general agent wrote that it had arrived late in the evening of the 7th after he had left the office.

Looking at that correspondence, and also at the letters before set out of the 11th, 14th, 17th, 22nd and 31st of October, it appears to me there is evidence that the company did assent to the transfer to Johnson, and that the assent was not signed on the policy, because the defendants had known of the fire before the signature was attached.

I think this objection was properly found for the plaintiff.

The 7th objection, that Gurd had no property in the tug at the time of the fire, has been disposed of already in considering the 2nd objection.

The 8th objection is that there was on board the vessel when the fire occurred, without the knowledge or permission of the company, petroleum, rock, earth and coal oil,

and the liquid products and constituent parts thereof, and it should have been so found. The defendants have, by their 8th paragraph of defence, pleaded that there were stored on the tug "more than five gallons of refined crude oil, and rock and earth oils, and their liquid products, at the time of the fire." That may not be what is meant, and the plea is capable of being read so as to confine the words "more than five gallons" to the refined oil for lighting purposes according to the words of the policy, which is the true reading of the condition; and then in addition to that there was certainly some black oil for lubricating purposes on board the boat. It was said in argument there were two gallons, but I do not see that or any specific quantity stated in the evidence except that Gurd said they kept two or three gallons on board, but he does not know of his own knowledge if they had any on board at the time of the fire. O'Neill, the engineer, said there were "two small cans" of it. He said that Gurd told him it was manufactured from crude petroleum.

Misner said: "The black oil is generally crude oil; it is generally used for machinery. I mean earth oil. There is more body to surface oil than to that which comes from the rock. The black oil is the crude oil." If black oil is manufactured from crude petroleum, or is earth oil, then it is one of the specified oils within the condition which was forbidden to be carried on board the vessel.

In my opinion the quantity that was kept on board avoided the policy; for the prohibition was against keeping or storing any of such oils on board independently of quantity without permission.

The ninth objection is that the policy was prior to the fire assigned by the assured to Johnson without the requisite permission of the company. That objection has already been disposed of by the consideration of the second and sixth objections.

The eleventh objection is, that on the 24th of June the plaintiff, as agent of the assured, renewed the policy without disclosing to the company the sale to Johnson on

the 1st of February, and the real interest of Gurd in the tug was not stated in or upon the policy. All that has been considered and disposed of. The only answer to it is the ratification by the company of the sale to Johnson.

The twelfth objection is that the sale by Gurd to Johnson was voluntary on Gurd's part, in which he used the proceedings of the Maritime Court to vest in Johnson a title free from the claim on the tug by reason of the libel in the American Court, and as between Gurd and Johnson it was a valid sale. That has been fully considered already.

The thirteenth objection is that judgment was given for more than was claimed in the action; and if the amendment by the addition of Johnson and Gurd as co-plaintiffs be allowed, the learned Judge should have permitted the amendment for the purpose of recovering the amount of the plaintiff's claim.

Neither Gurd nor Johnson, I think, claimed anything. I think the plaintiff should be limited to his own claim; for the plaintiff may have a right of recovery against the defendants, which the others may not have.

The salvage should not be allowed as a deduction from the amount of the plaintiff's loss.

The 15th and 16th objections may be considered together. They relate to the proof papers—that none had been furnished by the assured: that they did not comply with the 13th and 14th statutory conditions; and that the company are not estopped from disputing and did not waive the strict compliance with these conditions.

The defendants in their letter to the solicitors of the plaintiff of the 24th November, 1884, after stating they admit no liability under the policy, and without prejudice, and requiring all conditions to be strictly complied with, make the following objections:

1. To the declaration and claim being made by any one under the policy than the assured, or, in case of his absence or inability, by his agent, who must satisfactorily account for such absence or inability.

2. The claim papers are defective in not shewing who is the claimant.

3. In not setting forth as particular an account of the loss as the nature of the case permits.

4. We require the data shewing how the amount of the alleged loss is \$3,000.

5. A particular account shewing how, when and where the fire occurred.

6. And the extent of the injury.

7. Whether the tug was partially or wholly destroyed.

8. If partially destroyed, what was burned and what was saved.

9. Where the salvage is.

10. Its value.

11. We require all books, invoices, and vouchers in support of the claim to be produced, and

12. The certificate mentioned in clause 13(e) of the statutory condition.

To the 1st of these objections the papers shew that the declaration and claim were made by Johnson, and he was, for the reason before given, the proper person to make them.

To the 2nd objection Johnson's papers state, "I am the owner, &c. That the tug was destroyed by fire on, &c.: that the account set forth in the annexed claim-paper is just and true," &c.

The claim-paper is headed "Claim Paper," and is signed by Johnson, and the vessel was damaged by fire to the extent of \$2,800.

From these facts it sufficiently appears that Johnson is the claimant.

To the third objection, the account of loss is as follows:

1. The vessel was destroyed by fire on or about the 3rd of October last in the River Chenail Ecarti. 2. The cause of the fire is supposed to have been caused by a spark from the back head of the boiler as the fire started near that spot, and 3. By the fire the tug was damaged to the extent of \$3,000.

In connection with this objection the objections 4, 5, 6, 7 and 8 may be considered, as they all relate to the same

point: that as particular an account of the loss has not been given as the nature of the case permits. There does not seem any reason why a fuller account of the loss might not have been given.

It appears by the account given the tug was damaged to the extent of \$3,000, and by Mitchell's statement to the extent of \$2,000, at least. That shews she was not totally destroyed, although in insurance law the vessel might be a total loss. As the engine was not wholly destroyed, it might have been shewn what part or parts of the tug were damaged, and in what respect damaged. Saying she was damaged to the extent of \$3,000 does not give to the insurers the means of judging of the loss which they are entitled to have given to them. The claimant is putting his own valuation of the damage without shewing how he arrives at that estimate, or as the insurers say, without furnishing them with the data on which that estimate is based.

The claimant might have said the whole of the upper works and the whole of the machinery were consumed or rendered useless, and the vessel was burned to the waters edge, or, as the fact was; and the value of the upper works consisting of [specifying what such works consisted of] was of such a value, and the machinery consisted of such articles, which might have been generally described, and the whole of it was damaged, or such part or parts of it was or were damaged, and the extent of that damage was so much. And he should have stated what was saved or still serviceable, and the value of it, and that it could be seen at such a place. [The condition is, "and to exhibit for examination all that remains of the property which was covered by the policy."] The statement might properly also have mentioned whether the vessel took fire while she was in motion, or at the wharf, or at anchor; and if on her passage what the weather was, and whether it had anything to do with the origin of the fire, or with its rapidity, or with the difficulty of mastering it. Such an account, to put it fairly, should at least have been rendered as is usually

given in newspaper articles when a loss of the kind takes place. Here, there is nothing stated but that on such a day the vessel was destroyed in the Chenal Ecarti and damaged to the extent of \$3,000 by fire, supposed to have been from a spark from the back head of the boiler. That cannot be "as particular on account of the loss as the nature of the case permits," nothing being said of what was damaged or destroyed, nothing said of machinery, no details of any kind whatever given.

The 9th objection required the place where the salvage was to be stated, and the 10th objection that its value should be given: both could easily have been and should have been furnished.

The twelfth objection was complied with by the certificate being furnished in January, 1885. I am of the opinion defendants have not been furnished with "as particular an account of the loss as the nature of the case permits," and that not having been done they have not been furnished as the conditions require, with a statutory declaration that *the account*, that is, the account which should have been furnished, is just and true.

I do not attribute much, if any, weight to the objection that the books of accounts, invoices and vouchers should have been produced, for they would not, if there are any such books, &c., to produce have shewn what was lost, or how the claim is made up. What books, &c., are produced when a house or barn is destroyed or damaged? Even as to the machinery there are no books, &c., producible, not more than the bill or invoice of the original cost; and that also might be producible in the case of a house or barn.

The provisions as to producing the books, &c., apply especially and perhaps exclusively to the goods and merchandise of traders, and they are required to shew the loss of goods claimed for were really there, to be destroyed or damaged. When the books, &c., are produced on a loss of merchandise they are never furnished with respect to the house or store, although the premises in which the goods were may also be covered by the policy; nor, when the

goods in a dwelling house are claimed for, are the books, &c., of the claimant of much or perhaps any use, for no one enters the articles of his furniture in books, and in most cases there are no invoices and vouchers of them, although there might happen to be if the furniture was lately purchased.

The plaintiff furnished a declaration of loss, and in that document he states the loss to have been the "destruction of the hull and injury to the engine, boiler, &c., at least \$2,000 ;" and he states, also, "the company now have the renewal policy and refuse to deliver it to the deponent and the deponent cannot therefore refer more specifically to the same." What he calls the renewal policy is the original policy upon which the renewal premium was paid.

There are two observations to be made upon this state of things. The first is, the defendants refused after the loss to recognize the plaintiff in any way, or as entitled to be recognized by them in any way, because he was not the assured, but the mortgagee only, and because the 12th statutory condition provided that "the proof of loss must be made by the assured, although the loss be payable to a third party."

The second is, the defendants had possession of the policy and would not give it up to any of the parties. If the defendants were authorized by the conditions to treat the plaintiff as a third party, so far as the proofs of loss were concerned, and to require them to be given by Johnson if he were the assured, such proof Johnson has not given. But Johnson's solicitors could not get the policy, and they say in their note to the defendants of the 14th November that Mr. Rowland, the inspector of the company, was at Sarnia on the 5th of that month and promised to send up the claim papers, but that had not been done. Now, these claim papers which insurance companies invariably send out to be filled up by the claimants in case of loss, were not sent, so that the policy and the claim papers were retained by the defendants; and it seems rather inequitable on their part to set up the imperfect compliance with

the conditions of the policy when they had the policy and would not give it up, nor a copy of it, when requested to do so, and when they would not furnish the claim papers according to the usual practice, which papers contain the best and most precise statement of the requirements which the company desire to have made to them. The plaintiffs should have replied this matter if they meant to rely upon it, for it is otherwise a matter in issue in the cause. But is the plaintiff only a third party? He was by reason of his interest and risk an *insured* party, and as such he now brings and is entitled to maintain this action.

The special matters stated are in my opinion an answer to the alleged imperfect compliance by the plaintiffs or any other party with the condition requiring the full particulars of the loss, &c., to be stated.

Whether it is necessary to plead the withholding of the policy and papers or not, must depend upon that being the only thing which stands in the way of the plaintiff's recovering. If it be not, there can be no object in pleading, and I am of opinion that the fact that there was stored and kept on the tug the black oil, or earth oil, as it is otherwise called, is within the express words of the condition, and does avoid the policy.

After preparing my judgment in this case, I was allowed the perusal of the judgment of my brother O'Connor, and I find he has noticed a point in the wording and construction of the policy which I did not refer to when I wrote my opinion.

The condition which contains the prohibition against having more than five gallons of petroleum, &c., refers to the same being stored or kept in the *building* insured, instead of in the vessel or on board the vessel insured. And my brother O'Connor is of opinion that the condition so expressed does not in any way refer to the vessel, and that the plaintiff is entitled to recover, notwithstanding there was kept and stored in the vessel a larger quantity of petroleum, &c., than the allowed quantity of five gallons.

I do not think that is the effect of the term *building* being used instead of vessel.

It is a mistake, no doubt, but it is not one which avoids the condition. It has arisen from the defendants using the form of policy for the insurance of buildings upon land property in place of a marine policy, and the term building passed unobserved.

The parties meant something by the condition, and it is very plain they both meant and understood that the condition was there were not to be more than five gallons of petroleum, &c., kept or stored upon the *vessel*. If so it can be corrected if necessary, but I don't think it requires correction.

In the *Beacon Fire and Life Ins. Co. v. Gibb*, 9 Jur. N. S. 185, 1 Moore's P. C. C. N. S. 73, the insurance was upon a steam vessel, and the form of policy used was that in use for insurance on houses and buildings. The condition in question in that case was "that if more than 20 pounds weight of gunpowder should be on the *premises* at the time when any loss happened, such loss should not be made good."

The principal question was whether gunpowder to the extent of 100 pounds, carried for *freight* was within the condition. The Court held it was. The other question was whether the term *premises* applied to the vessel.

Lord Chelmsford, in giving the judgment of the Privy Council, said:

"In order to construe a term in a written instrument, where it is used in a peculiar sense differing from its ordinary meaning, evidence is admissible to prove the peculiar sense in which the parties understood the word, but it is not admissible to contradict or vary what is plain. Now the word *premises*, although in popular language it is applied to buildings, in legal language means the subject or things previously expressed. * * It is quite clear the popular sense of the word is excluded because there are no buildings to be insured. Then it only remains to give it that meaning which the reasonable construction of the contract requires." Lord Chelmsford then quotes the language of Mondelet, J., in the Court of Lower Can-

ada, as follows: "The form of the policy is one which should not have been made use of relative to a steamer. But inasmuch as the policy, though improper, has been accepted by the insured, and they must be taken to have read it since they have signed it, it is right and just that the word *premises* should be interpreted against them and adjudged to refer between the parties to the steamer which was the object, the sole object insured."

See also the case of *Stewart v. Merchants' Marine Ins. Co.*, 16 Q. B. D. 619, at p. 621, where it is said by Lord Esher, M. R., in Appeal: "The policy is carelessly framed. It is the ordinary form of policy on goods to which stipulations have been added, so as to make it a policy on the ship only; but much is left which cannot apply to a policy on a ship, and in the memorandum which we have to construe all the provisions with regard to corn, fish, salt, fruit, &c., which have nothing to do with an insurance of the ship, are left in. The first question is how are we to deal with such a policy. Our opinion is that as it is a policy on the ship we must strike out all the immaterial stipulations which cannot possibly apply to an assurance of the ship, and begin by reading the policy as if the warranty in the memorandum were as follows: 'The ship shall be warranted free from average under three per cent., unless general, or the ship be stranded, sunk, or burnt.'"

The whole application shews it was the form which was used on procuring risks upon buildings, houses, and goods. One of the headnotes is: This application must not be used for manufacturing or farm risks.

Then it proceeds: On a building — stories high, built of —, and covered with —, owned by —, situate and being No. —, on the — side of — street.

On household furniture, &c. All that is passed over, and at the bottom of it is written, "The Steam Tug Jerome."

The enquiries are: "1. Boat (*a*), does it stand on leasehold ground," &c.?

The policy is on "The Steam Tug Jerome, subject to the conditions and stipulations below;" and among those

conditions is the one relating to the petroleum, rock oil, &c., stored or kept "in the building insured."

It is laid down in *Parkhurst v. Smith*, Willes, at p. 332 : "The first thing we ought to enquire into is the intent of the parties. If the intent be as doubtful as the word it will be of no assistance at all, but if the intent be plain and clear we ought, if possible, to put such a construction on the doubtful words of a deed as would best answer the intention of the parties and reject that construction which manifestly tends to overturn and destroy it; * * * and to endeavour to find out such a meaning in the words as will best answer the intent of the parties."

In *Ford v. Beech* 11 Q. B. at p. 866, the Court of Ex. Ch. said, when the word *suspended* was used as to a cause of action which would have defeated the action, that the agreement of the parties should not be construed so as to defeat it, and that the term *suspended* should be construed as a mere forbearance of suit for the time provided for. The Court said : "In adjudicating upon the construction and effect in law of this agreement, the common and universal principle ought to be applied ; namely, that it ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent."

The insurance company have insured *the steam tug*, and in one of the conditions of the policy they call that tug "the building insured." A *boat* is not accurately described as a *building*. It is not, however, an insensible expression when so applied. It is manifest the defendants in naming the *building*, have referred to and named the tug by that description.

A boat is built ; so also is a wall. If the houses and the walls erected as fences of a property were destroyed by fire, it might perhaps not inaccurately be said that the *buildings* were all destroyed. It might more correctly be

so said if they were all levelled by an earthquake, or battered down in a siege.

The company could not escape liability, because, in the provision for payment of the loss by fire, they have called the tug the building insured. So neither can the insured escape responsibility because he has stored or kept a prohibited article, dynamite for instance, in the tug, merely because the tug has been called a building.

I must say I have no doubt the condition attaches in this case, notwithstanding the loose, inaccurate designation of the property insured. The plaintiff took the policy with that description of the boat contained in it, both parties knew what was meant and what was intended; neither party can pretend to have been misled by the use of the word building. The term applies, and can only apply, to the boat. The construction must be put upon the whole of the contract, and according to that rule, and to the other rules of construction applicable in such a case, the condition in question must be read as referring to the boat.

ARMOUR, J.—I have only to add to what I have already written in this case, that I agree with the learned Chief Justice in limiting the amount recoverable in this action to the amount of the plaintiff Mitchell's interest as mortgagee, and with his judgment generally, except so far as it otherwise conflicts with what I have already written and except in his view that the transfer made to Johnson of the tug was not "by the operation of the law," for I think that were I to hold that such transfer was not by the operation of the law, I would be sinning against the decision of all the Courts that decided *Macdonald v. Crombie*, 2 O. R. 243, 11 S. C. 107, a decision which I am compelled to hold in the most profound respect; and except, also, in the conclusion at which the learned Chief Justice has arrived as to the issue joined upon the 8th paragraph of the statement of defence. That paragraph sets up the following statutory condition: (9) The company is not liable

for the losses following: "For loss or damage occurring while petroleum, rock, earth, or coal oil, camphine, burning fluid, benzine, naphtha, or any liquid products thereof, or any of their constituent parts (refined coal oil for lighting purposes only, not exceeding five gallons in quantity, excepted), or more than twenty-five pounds weight of gunpowder, are stored or kept in the building insured or containing the property insured, unless permission is given in writing by the company." I found for the plaintiff on this issue, for I did not think that there was satisfactory evidence upon which I ought to find that in the words of the paragraph, "more than five gallons of refined oil and rock and earth oils and their liquid products" were stored or kept in the tug at the time of the fire. The engineer of the tug was the only person who gave evidence as to the oil used on the tug when the fire took place. Misener spoke only of what was used when he owned her, and Gurd's evidence, taken for the purpose of discovery, was not evidence against Mitchell. The engineer was asked: Q. "What style of oil did you use upon the boat? A. Black oil. Q. Manufactured from what? A. I don't know." He afterwards said it was black lubricating oil. Misener said: "The black oil is generally crude oil. It is generally used for machinery. I mean earth oil. There is more body to surface oil than that which comes from the rock. Animal and fish oils are not black. The black oil is the raw, crude oil. The black oil is used on slow machinery." This evidence did not and does not, in my opinion, establish that the black oil which was used by the engineer at the time of the fire was either rock or earth oil, or their liquid products, and there was no evidence to show that it was. Then as to the quantity, the engineer was asked:

Q. "How much of this oil was there on at the time of the fire? A. I don't know. Q. How many gallons? A. I don't know. Q. More than one gallon? A. May have been one gallon, may have been more. Q. As much as one? A. May be one, I cannot say. Q. There was some on her? A. Yes, there were two small cans."

This oil was in use and being used for oiling the machinery, and there was no evidence that it was otherwise stored or kept in the tug, and it seemed to me and still seems to me that the having black oil in the tug in the quantity proved, even if it was shewn to be rock or earth oil, for the purpose of constant use, and it being undoubtedly used for oiling the machinery, was not a storing and keeping it with the fair meaning and reasonable construction of the condition. If so having for use is to be held a storing or keeping within this condition, then any person having a small quantity of benzine in his house for use in removing stains from cloth, and many persons, if not a majority of persons, have such, thereby, in case of fire, loses his insurance.

In my opinion the words "stored or kept," as used in this condition, are too indicative of duration and permanence to cover a user such as was had of this black oil on this tug.

There is a great deal to be said in favour of my brother O'Connor's view as expressed in his judgment; and one reason of the Legislature in allowing the statutory conditions to be varied was no doubt in order that they might be made applicable to other subjects of insurance than those to which they were in terms made applicable.

In my opinion the judgment should be for the plaintiff for the sum of \$1,910.85, and interest from the 1st day of January, 1885, and costs, and the motion should be dismissed with costs.

I refer to *United States v. Smith*, 4 Cranch, C. C. 659.

O'CONNOR, J.—The policy in this case includes as one of its conditions section (f) of the 10th statutory condition of the schedule to the Act, R. S. O. ch. 162, which is as follows: "For loss or damage occurring while petroleum, rock, earth, or coal oil, camphine, burning fluid, benzine naphtha or any liquid products thereof, or any of their constituent parts, (refined coal oil for lighting purposes, not exceeding five gallons in quantity excepted), or more

than twenty-five pounds weight of gunpowder are kept or stored in the building insured, or containing the property insured, unless permission is given in writing by the company."

In this case the property insured was a steamboat of the class commonly called "a tug."

Upon the statutory condition above cited two questions, it seems to me, arise, besides the other questions involved; first, is a steamer or tug a building within the meaning of that condition? Second, was the prohibited article stored or kept in it?

The first question is one of law, of legal interpretation; the second is a mixed question of law and fact—of legal interpretation in the light of the evidence. If the tug was a building within the meaning of the statute and condition, and the prohibited article was stored or kept in it, the plaintiff is barred from recovering in this action; but if the contrary of either of these two propositions is established the plaintiff ought to recover, must recover.

Now as to the first proposition. Etymologically considered, the term building, as a noun, may be said to include a house, a ship, a vessel, a steamboat, a railway car, or any other structure that may be properly said to have been built; but in the interpretation of statutes and contracts words are not to be construed in that strict, literal sense; indeed, there are few words in common or in scientific use which bear such a meaning, although they bear a meaning analogous to that.

In every written contract words are to be understood in their common and popular sense: 1 *Parsons* on Marine Insurance, 125; and a like rule of interpretation is applied to the language of statutes; *Hardcastle* on Statute Law, p. 18, *et seq.*

Wilberforce on Statutes says, p. 122: "The first rule on this subject is, that the words are to have their ordinary grammatical meaning—that which naturally and obviously belongs to them, and has been given to them by common usage; in the common language of mankind." *Morrell* on

the Law of Insurance (edition of 1883) p. 31, states: "Persons desirous of making insurance upon buildings will generally be required to describe the following particulars, viz.:—Of what material the walls and roof of each building intended to be insured are constructed; whether the same are occupied as private dwellings or otherwise." The term, building or buildings, as commonly used, never suggests or conveys to the mind of a hearer the notion of a ship, a vessel, a steamboat, a railway car, or any other structure, the use of which implies locomotion; on the contrary, it invariably suggests a house, "structure of a stationary character, roofed or covered, as a dwellinghouse, a stable, a storehouse," &c. And this distinction is established, not only by common usage, but by technical usage also, as a term of art. Speak to an architect of a building and it suggests to him the notion, not of a ship, vessel, or steamboat, but of a house, &c.: in architecture the term building is so understood. The article "Architecture," in the ninth edition of the *Encyclopædia Britannica*, shews this distinctly.

In the text books on insurance the term is used with the same signification.

Thus in *May on Insurance*, sec. 420: "House or building embraces everthing appurtenant and necessary to the main building and used though not connected with it (see note 11 for cases.) In secs. 261 and 262, the term building and buildings is applied and limited to houses. Section 261 directs: "In the description of buildings on which insurance is sought, care should be taken to give not only a description of the main building, but also of the subordinate structures attached, such as kitchens, sheds storehouses, &c." The first statutory condition commences with the expression:

"If any person or persons insures his or their buildings," &c. Houses are here distinctly meant. Section *c* of the 10th condition says: "Where the insurance is upon buildings for loss caused by the want of good and substantial brick or stone chimneys," &c. Here there is no doubt of the meaning. Section *e* is: "For loss or damage occurring

to buildings or their contents, while the buildings are being repaired by carpenters, joiners, plasterers or other workmen, &c. But in dwelling houses fifteen days are allowed in each year for doing incidental repairs."

It is clear that in this section houses—dwelling and other houses—are meant.

It is also quite clear that in no instance throughout the conditions is the term building or buildings used in any other sense or with any other meaning.

Indeed the conditions appear to have been prepared with reference only to houses and property contained in houses. Neither in the Act, nor in the conditions are there any provisions, words or terms which seem to indicate that marine insurance, as such, was contemplated by the legislature with reference to these statutory conditions, but that buildings, meaning houses, not ships, vessels, steamboats, or railway cars, were intended and meant. Of course ships, vessels, steamboats and railway cars may be insured, as they were insured before the statute containing these conditions was passed.

The conditions of the statute apply to houses and to goods contained in houses, or to either.

The 6th and 7th conditions do not apply to houses, but to goods; nor does section *d* of the 10th condition; on the other hand section *c* of the same condition applies to buildings only. The third clause of the statute does not interfere with this construction; for that section makes all the conditions part of every policy of fire insurance only as against the insurers, and the condition in question does not apply in that way; in short, it does not apply to the property insured in this case, and being inappropriate, is nugatory.

Now as regards the other questions, and granting, arguendo, that the tug was a building, how can it be said that an article which was brought, in a small quantity, for immediate and continual use, in lubricating the machinery, was stored or kept in the building? The words stored or kept are used in the alternative as synonymous. Storing

or keeping an article seems to me to convey the notion of conservation, a keeping inconsistent with the destruction of continual or occasional use.

The defence on this ground is merely a technical one, altogether destitute of merit, because it is not pretended that the prohibited article, the coal oil, had any connection with the fire or the origin thereof: there is but the naked fact, that it was on board when the fire occurred.

Such a defence deserves no favour; on the contrary, it deserves to be treated with technical strictness.

As regards the other matters involved in the action, except as to the proof of loss which I consider sufficient, I concur with the judgment of the learned Chief Justice, with a perusal of which I have been kindly favored.

I think the plaintiff ought to retain his verdict, reduced as stated by my brother Armour, and the motion be dismissed with costs.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

HISLOP V. THE TOWNSHIP OF MCGILLIVRAY.

Municipal corporation—Original allowance for road—Physical obstacles—Duty to open—Mandamus—Discretion—Consolidated Municipal Act, 1883, secs. 524, 526, 531, 544, 546, 550, 566.

In an action against a township charging, (1st) the stopping up of a highway, thereby preventing access to plaintiff's farm; (2nd) the obstructing of a highway, thereby, &c.; (3rd) the not maintaining and repairing a highway, thereby, &c., it appeared that the part of the highway in question was part of the original allowance for road which had never been opened or made fit for travel, and that physical obstacles prevented its being made fit for use except at a very large expense. It also appeared that the defendants had procured another site for a road, by which the plaintiff had access to and from his property, although not so convenient to him as the road in question if opened up would be: the defendants, however, had, in endeavouring to procure for the plaintiff a more suitable road to the east, been prevented by him from doing so, a road to the west they still offered to him.

Held, per WILSON, C. J., that the defendants were not liable under the circumstances for not maintaining and repairing the road.

2. That an action claiming a mandamus will lie against a municipality for not opening an original allowance for road, by reason of which the occupant of land cannot have access to and from his land, to and from a public road, if there be no other convenient way to and from his land, and if there be no good reason, in respect of means or otherwise, why such allowance should not be opened, and if the work required to be done for that purpose be worth the outlay required to open and maintain the same.
3. That although the municipality must be allowed a very large discretionary power to do or not to do such a work, it has not the sole and uncontrolled right to avoid doing it.
4. That if the claim made had been proved as stated, a new trial would have been granted, for the facts found by the jury were not warranted by the evidence.

Semble, if the evidence given will not warrant the Court in granting a mandamus upon motion to the Court, and the Court has before it all the materials necessary for finally determining the question in dispute, judgment may be given for the defendants under Rule 321 of the Judicature Act.

Per ARMOUR, J.—That the *locus in quo*, though a highway in law, was not one in fact, and that the action would not lie.

Per O'CONNOR, J., that the action was sustainable in law, and the verdict was supported by the evidence.

THE statement of claim alleged that the plaintiff was and had been for many years past the owner of and residing upon lot No. 8, in the 6th concession of the township of McGillivray, containing 100 acres.

2. That the original allowance for road between the 6th and 7th concessions of the township was in front of plaintiff's lot, which lot abutted upon the said allowance; and and there was not and never was any other public road or highway abutting upon the said lot, or by means whereof ingress and egress thereto and therefrom could be had.

3. The council of the township had for many years past stopped up a portion of the said road, and had thereby prevented and still prevented plaintiff from having access to his land, over or by means of said road.

4. The council of the township many years ago closed up a portion of the said road, and thereby excluded and continued to exclude plaintiff from ingress and egress to and from his land over the said road, without having made to plaintiff any compensation and without providing for his use any other convenient road or way of access to said land.

5. It was the duty of defendants to maintain and repair said road, and to keep the same in repair, yet defendants had not maintained and repaired and kept in repair said road.

6. Defendants had from time to time promised plaintiff to open, maintain and repair, and keep in repair said road, but had always neglected to do so.

7. The defendants had also frequently promised to compensate plaintiff for the loss sustained by him by the closing of said road, and to provide for his use some other convenient road or way of access to his said land, but had never done so.

8. By reason of the wrongful acts and neglect of duty of defendants, set out, plaintiff had been and was deprived of the full use and benefit of his land, and had been obliged to expend large sums of money and great labour and loss of time in obtaining and making right-of-way roads and bridges in and upon his land and other adjacent lands, in order to obtain a way of access to his land, and had been otherwise injured, and put to great loss, costs, and expense.

The plaintiff claimed :

1. Compensation and damages for and in respect of the wrongs and acts complained of.

2. An injunction compelling defendants to open up said road, or, in the alternative, to provide for the use of plaintiff some other convenient road or way of access to his land.

3. An injunction compelling defendants to repair and keep in repair said road.

4. Further and other relief.

Statement of defence :

2. That plaintiff was the owner of east half of lot 7 in 7th concession of said township, which adjoined the land mentioned in the statement of claim.

3. That what was called the original allowance for road between the sixth and seventh concessions, in front of the lands of plaintiff and for a considerable distance to the east and west of them, had never been opened by defendants or the council of the township, in consequence of natural and physical difficulties caused by the existence of two very steep hills, and deep ravines, and a stream which crossed the same twice within a distance of 2,000 feet, and which rendered it impossible for defendants to make and maintain a road there safe for public travel.

4. That having regard to the circumstances mentioned in paragraph two it was, if not physically impossible to make and maintain the said road, practically impossible to do so, having regard to the expenditure that would be necessary for that purpose.

5. That owing to the circumstances mentioned in paragraph two it would not be a reasonable or proper exercise of the powers of the council to open and make said road ; and the council, in the honest exercise of the discretion which it claimed to have in the premises, had refrained from opening and making and had not made said road.

6. That on 15th September, 1862, at the request of plaintiff and other residents along the alleged road allowance, the council passed a by-law for opening and had opened and made a public highway across the southern

part of said seventh concession between the points mentioned in paragraph two, and said highway had ever since been kept and maintained by defendants in a good and sufficient state of repair, and was available for the purposes of the plaintiff in going to and from his said lands and premises.

7. Plaintiff had access to and from his lands and residence directly to said road allowance and over the same, and he acquiesced in making said new road, and accepted same in lieu of any right which he might have to require so much of the alleged original road allowance for road as lay between the territorial points of said new road to be made and maintained fit for travel, and defendants incurred expense in making said new road and acquiring land therefor on the faith of such acquiescence and acceptance.

8. The plaintiff had also a roadway at the rear of his said lands, extending eastward to the road allowance between lots 10 and 11 in the 6th concession, and a means of access thereby to and from the said lands and residence.

9. Defendants, while not admitting any obligation on their part to do so, had offered to provide, at their own expense, a roadway from the road opened by them, as mentioned in paragraph five, to plaintiff's land, in lieu of that part of the alleged road allowance in question opposite his land, or a roadway from the rear of his land in line with the east side thereof to the road allowance between the 4th and 5th concessions; but plaintiff refused to accept either of said roads, and insisted on his alleged right to have the said alleged road allowance opened and made fit for travel.

10. Defendants submitted it was discretionary with the council whether or not to open a road allowance within their jurisdiction which had never been opened, and that the exercise in good faith of such discretion was not open to review.

11. Defendants further submitted that at all events it was discretionary with the council to determine, having regard to the circumstances of each case and the expendi-

ture that would be involved in doing so, whether a highway which had not been opened by reason of natural obstacles existing in the condition of the way, which prevented or rendered more than ordinarily difficult and expensive the making and maintaining of it as a roadway fit for travel, and that such a discretion exercised by a municipal council in good faith could not be reviewed by this Court.

12. Defendants further submitted plaintiff had not, by his statement of claim, made or stated any case entitling him to relief in this Court, and they claimed the same benefit of this objection as if they had demurred to the statement of claim.

13. If plaintiff was entitled to damages he ought not to recover any which were sustained more than three months before the commencement of the action, and they pleaded, in bar of the said claim, section 531 of the Consolidated Municipal Act, 1883.

Reply.

1. The plaintiff admitted he had a means of ingress and regress to and from his said lands, as alleged in the statement of defence, but said that in order to obtain the said means of ingress and regress he had been obliged to and had expended large sums of money in making the necessary roads and obtaining the necessary rights of way over other lands than his said homestead, all of which had been rendered necessary and incurred by reason of the wrongful acts and neglect of defendants complained of in the statement of claim, and plaintiff had in his said statement alleged damage in respect thereof.

2. The plaintiff admitted the defendants had frequently promised to provide for him a convenient road or way of access to the said lands, but the fact was the defendants had always refused and neglected to do so.

3. Except as to the said admission the plaintiff joined issue upon the said statement of defence.

The defendants joined issue.

The action was tried at the last Winter Assizes, held at London before O'Connor, J., and a special jury.

The following questions agreed upon by counsel were put to the jury, and the answers thereto were given:

1. Was the portion of the road in question part of the original road allowance? A. Yes.

2. Had the defendants the *financial ability* to make the said road reasonably fit for travel? A. Yes.

3. Was it *practicable* to make the road allowance in question reasonably safe and fit for travel without encroaching upon the lands adjoining it? A. Yes.

4. Would it have been a reasonable expenditure of public money to have made the said allowance fit for travel? A. Yes.

5. Had the defendants a reasonable time and opportunity to do the works necessary to make the said portion of the said road fit for travel, or to provide some other means for the plaintiff's ingress and egress to this lot No. 8? A. Yes.

6. If the plaintiff had not convenient means of ingress and egress to his said lot number 8, was the want of it due to the default of the defendants, or owing to the plaintiff's own fault? A. Defendants.'

7. Under all the circumstances in evidence should the defendants have made the said portion of the said allowance fit for travel? A. Yes.

8. Did the defendants, in determining not to make the road, so determine in good faith? A. Yes.

9. If the jury were of opinion that the defendants were not in default in making fit for travel the said portion of the said original allowance, then how, in their opinion, should the road have been made? First, through Kennedy's lot? Second, by cutting down the eastern hill, and going round the western hill to the plaintiff's land? Third, or by what other means? No answer.

Juryman—That question is answered by the previous one.

10. What damages, if any, were allowed the plaintiff for the loss and inconvenience suffered by him for the whole period—for the three months preceding the bringing of the action?

The answer was that on account of opening the original allowance the jury assessed no damages.

O'CONNOR, J.—There ought to have been nominal damages; you mean no substantial damages.

Juryman—It was the understanding no damages.

Damages to the amount of \$1 were given by consent.

At the last Hilary Sittings defendants obtained an order *nisi* calling upon plaintiff to shew cause why the verdict and judgment for plaintiff should not be set aside and a verdict and judgment be entered for defendants, on the following grounds:

1. That there was no duty cast upon defendants by statute or otherwise to open or make fit for travel that part of the road allowance in question which plaintiff alleged to be out of repair.

2. There was no duty cast upon defendants by statute or otherwise to provide for plaintiff means of access to or from his lands.

3. There was no evidence to shew that the alleged road allowance was a public highway.

4. The jurors having found that defendants acted *bonâ fide* in refusing to open the said road allowance and make it fit for travel, their refusal was not open to review in this action.

5. Plaintiff was not entitled to a mandamus commanding defendants to open and make fit for travel the said alleged road allowance.

6. In any event no action by plaintiff will lie against defendants for the alleged breach of duty.

Or why the findings of the jury (except the findings that defendants acted *bonâ fide*) should not be set aside and a new trial had between the parties on the law, evidence, and weight of evidence; and because the said findings

proceeded upon the erroneous ground that defendants were bound to provide for plaintiff a convenient means of access to and from his lands; and for misdirection by the learned Judge in ruling that defendants were bound to provide means of ingress to and egress from plaintiff's lands for him, and that plaintiff, if entitled to damages at all, was entitled to damages not limited to the period of three months before the commencement of the action.

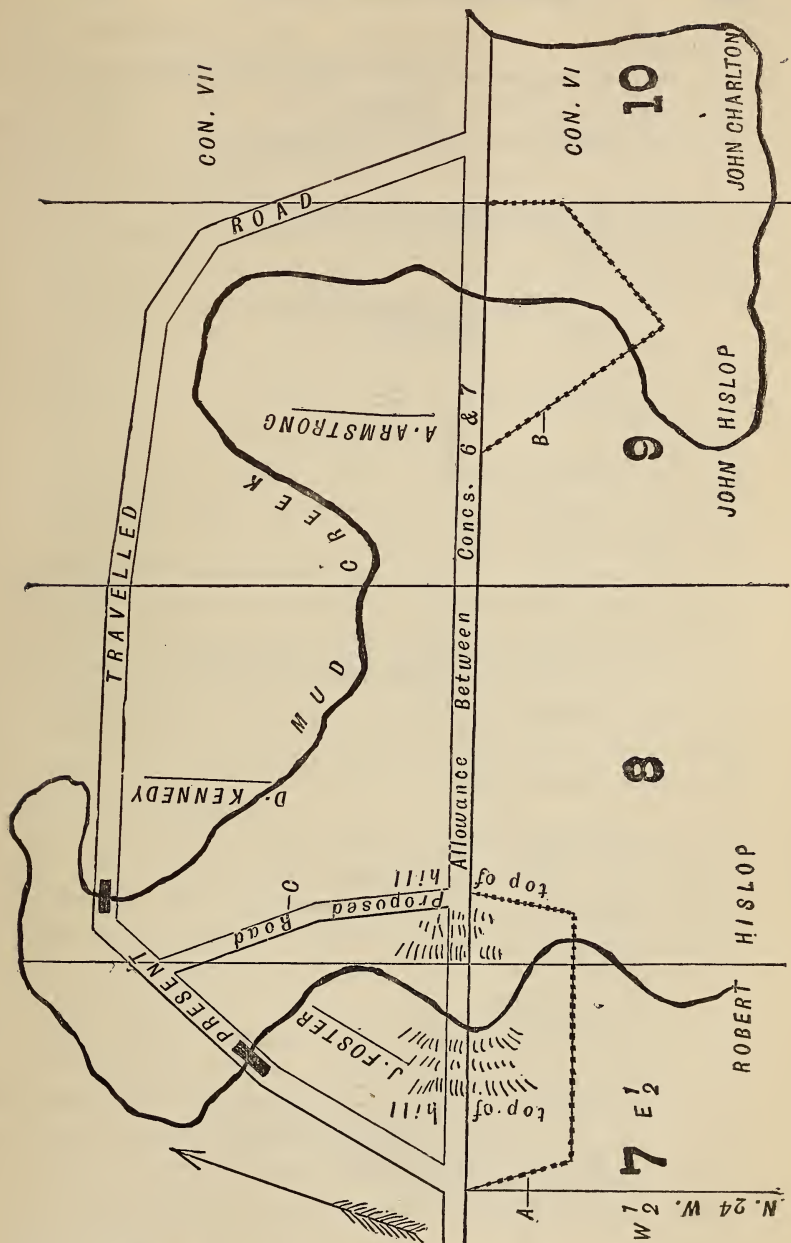
There was a notice of motion given to the like effect.

The case was argued at the last Easter Sittings.

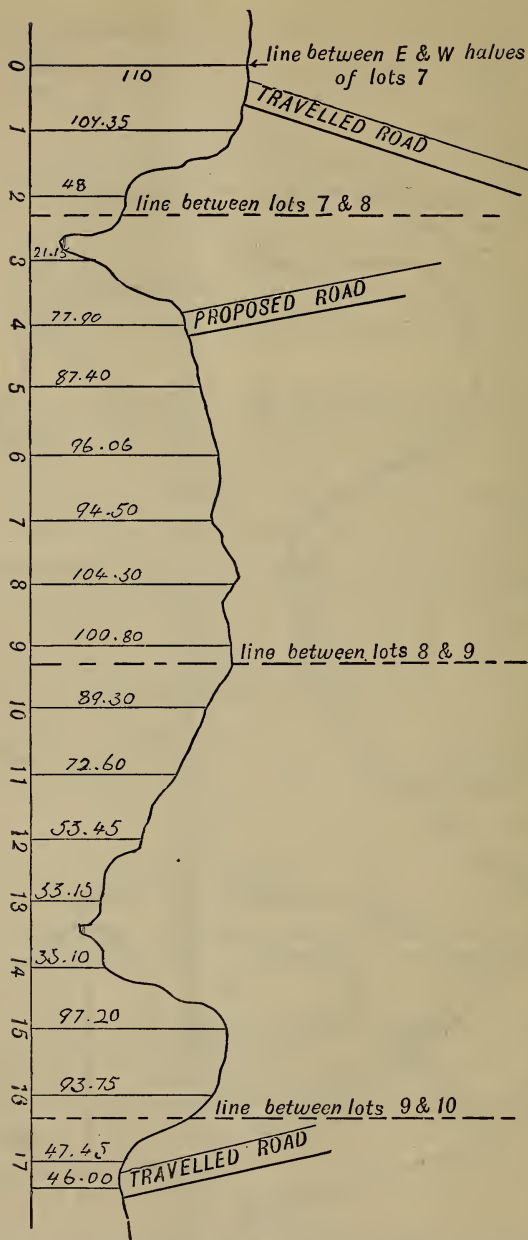
W. R. Meredith, Q. C., supported the order *nisi* and notice of motion, citing *Pittsburgh R. W. Co. v. City of Pittsburgh*, 80 Penn. 72; *Todd v. Rowley*, 8 Allen 51; *Regina v. Bamber*, 5 Q. B. 279; *Regina v. Hornsea*, Dears. C. C. 291; *Regina v. Greenhow*, 1 Q. B. D. 703; *Angell on Highways*, 2nd ed., 33, note 4; *O'Connor v. Otonabee*, 35 U. C. R. 73; *Caswell v. St. Marys, &c., Co.*, 28 U. C. R. 247; *Holman v. Townsend*, 13 Metc. 297; *Caledonia R. W. Co. v. Ogilvy*, 2 Macqueen, Sc., App. 229; *Baird v. Wilson*, 22 C. P. 491; *Benjamin v. Storr*, L. R. 9 C. P. 400; *Fritz v. Hobson*, 14 Ch. D. 542; *Wilby v. Henman*, 2 C. & M. 658; *Wilkes v. Hungerford Market Co.*, 2 Bing. N. C. 281; *Regina v. Yorkville*, 22 C. P. 436.

McCarthy, Q. C., and *R. Meredith*, contra, cited *Spence v. London and Birmingham R. W. Co.*, 8 Si. 193; *Castor v. Uxbridge*, 39 U. C. R. 113; R. S. O, ch. 52; *Re Moulton v. Haldimand*, 12 A. R. 529, per Patterson, J. A., and cases there cited; *Rex v. Severn and Wye R. W. Co.*, 2 B. & Al. 646.

The plans put in shewed that on each side of the creek there was a wide space, apparently low and level or marsh land, and hills, also, extending along the allowance for road in front of John Hislop's lot No. 9, quite a distance, so as to require the proposed road B., and that there was the like formation of land on each side of the creek along the allowance for road in front of lots 7 and 8, to require the proposed road A or C.



The dotted lines A and B are proposed roads on one plan, and C north of the allowance for road is a proposed road on another plan.



Sketch of Mr. Davidson's Profile of Locality, which was 1 inch to 100 feet.

December 23, 1886. WILSON, C. J.—The enactments of the Municipal law, 1883, applicable here are the following :

Section 524: "All allowances made for roads by the Crown surveyors in any township * * shall be deemed common and public highways."

Section 526: Subject to the exceptions and provisions contained in the Act, "Every municipal council shall have jurisdiction over the original allowances for roads, and highways and bridges within the municipality."

Section 531: "Every public road, street, bridge, and highway, shall be kept in repair by the corporation; and on default of the corporation so to keep in repair, the corporation shall, besides being subject to any punishment provided by law, be civilly responsible for all damages sustained by any person by reason of such default, but the action must be brought within three months after the damages have been sustained."

Section 544 prohibits councils from closing any public road or highway "whereby any person will be excluded from ingress and egress to and from the lands or place of residence over such road, unless the council, in addition to compensation, also provides for the use of such person some other convenient road or way of access to the said lands or residence."

Section 546 declares that no municipality shall pass a by-law to stop up, alter, widen, divert, or sell any original allowance for road, or to establish, &c., any other public highway, &c., until the prescribed preliminary proceedings have been taken.

And by section 550 the council may pass by-laws to "open, make, preserve, improve, repair, widen, alter, divert, or stop up roads, streets, squares, alleys, lanes, bridges, or other public communications within the jurisdiction of the council, and for entering upon, breaking up, taking, or using any land in any way necessary, or convenient for the said purposes, subject to the restrictions in the 'Act contained."

Section 566, sub-sec. 2, gives the township council power "to stop up, lease or sell any original allowance for road passed in pursuance of section 546, upon the by-law being confirmed by the county council."

The plaintiff's case, as stated by him, is :

1. That the defendants have stopped up a portion of the road and have thereby prevented him from having access to his land over the said road.

2. That the defendants, many years ago, closed up a portion of the road and have thereby excluded the plaintiff from having ingress and egress to and from his land, over the said road.

3. That it is the duty of the defendants to maintain and repair the said road, and to keep the same in repair, but they have not done so ; and the plaintiff claims damages, and an injunction to compel the defendants to open up the road, or to provide for the plaintiff some other convenient road to his land ; and to compel the defendants to repair and to keep in repair the said road.

The first and second of these statements have not been proved. The defendants have not, in fact, stopped up or closed that portion of his road. The part in question is part of the original allowance for road, which has never been opened or made fit for travel ; and the evidence shews it was not opened because the defendants were of opinion the ground was too rugged and ill-adapted for a road, and because too large a sum of money would be required to make it a good road, and that rather than open up that part of the allowance the council procured another site for the road, and they made that new site the road or substitution for the bad portion of the original allowance. It cannot therefore be said the defendants have stopped up a road which has never been made nor opened as a road, and which never has been in a state upon or over which public travel could be or could have been had.

The defendants are required also to maintain and repair the part of the road allowance in question.

I think it cannot be said such a claim can be sustained against the defendants with respect to the part of the road allowance which has not been opened, but is still in its natural state, and in such natural state is not fit for a road, as before stated, and which has never been used as a road.

Maintain and repair have here the same meaning, and are used in the same sense. They apply to something then subsisting; now there is no subsisting road. There is an allowance for a road. There is therefore no road to be maintained or repaired in front of the plaintiff's lot.

It does not appear to me the statement of claim sets out a case which has been proved in fact, assuming the paragraph as to maintaining and repairing the road is supportable in law. And upon this ground alone, without considering the other very important questions which the case presents upon the evidence, and which arise from the arguments which were submitted to us, judgment might at once, I think, be given for the defendants.

If the evidence given had been laid before us upon a motion for a mandamus to open the portion of the road allowance in question, assuming a mandamus to be the proper proceeding, the plaintiff would not, in my opinion, upon the facts alone, without regard to any question of law, have established a right to have the relief by way of mandamus granted to him.

As this action is the first of the kind which has been brought, and the trial was one of importance, and as the case was argued before us at some length, and as the expense of the proceedings is no doubt very considerable, and as the parties will probably carry this to appeal, and would do so, however we may decide it, it may be better to consider the case somewhat more at large.

The facts then appearing by the notes of the evidence at the trial shew that for a distance of about 3,130 feet along the road allowance the road has not been opened.

About 620 feet of that distance opposite the plaintiff's land at the west, and about 900 feet opposite to John Hislop's land at the east, seem to be quite unfit for travel

at the present time. The intermediate distance of about 1,600 feet may or might, without extraordinary expense, be made fit for travel. Mr. Davidson, a P. L. S., described the locality as follows :

At the west part of that portion of the road allowance the hill on the west side of the creek is 85 feet high from the bed of the creek, and on the east side of the creek the hill is 66 feet high. The distance between the two points is 740 feet. From that easterly point there is high ground for a distance of about 850 feet. From there the land begins to descend about 70 feet to the east, to the bed of the creek, at that part of the line. Then at the distance of about 100 feet east of that easterly part of the creek the land rises, so that at about 200 feet in a horizontal line east from the creek the land is about 70 feet above the bed of the creek ; and after keeping that level for the further distance east of about 200 feet the land begins to descend, and in the further distance east of about 200 feet to the east it descends about 50 feet to the level of the travelled road at the easterly extremity of the unopened portion of the road allowance.

It appears the creek which crosses the allowance for road at the two points mentioned would require to be bridged. Mr. Davidson estimated the cost of making that piece of road fit for public travel at the sum of \$4,773. Mr. Fairbairn, a surveyor, had furnished the council with an estimate of the cost of the work—his estimate was \$5,500.

Mr. Bradley, the deputy-reeve of the township, said he did not think the sum of \$4,500 or \$5,000, would be too high an estimate for the work.

Andrew Erskine, who had been reeve of the township, said he thought the work could be done for from \$3,000 to \$4,000. Mr. Jones, a surveyor, said the work would cost \$2,450, and about \$600 more, if piling had to be done to prevent the earth from falling on the adjoining lands.

These are the different estimates made of the cost of opening that part of the original allowance, and the council

thought that sum too much to be expended in doing that work, which was of no kind of use to any other persons than to the plaintiff and his brother, whose lands fronted on the unopened part of the allowance, and the jury found the council acted in good faith upon their part.

The plaintiff might however say, as he has said and does say, the expense is not the only question to be considered, but that he is entitled to have a roadway which will give him access to his land. The defendants, assuming for the present the plaintiff had some such claim, say if the authorized allowance for road to the farm will cost too much to make a road there, they are not bound to open it if they find another road way for him in its stead; and they say they have done that, and they have never refused to do so; and they say besides that the plaintiff has already all the roadway necessary and convenient for him.

It appears that at the west of the plaintiff's land he can get from it to the allowance for road which is opened and travelled there, and he can then travel westward without any hindrance. If he desire to go from there to the east he can make use of the *forced road* which is opposite the west part of his land, and which the defendants acquired and constructed more than twenty years ago, so as to avoid the bad part of the allowance for road, and by following it he can reach the allowance for road to the east of the bad part of the original allowance.

The plaintiff, however, complains that he is obliged to travel along a considerable portion of his own land to get on to the allowance for road at the west of his property, and that he should be enabled to get on to the highway from that part of his land which is the most convenient to him where his house and buildings are situate. The defendants proposed to give him a roadway from the part of his land which would be convenient for him, and to continue that roadway to the *forced road* before mentioned. This proposed way to the forced road would cost, it was said, \$295.

The plaintiff contended, however, he was entitled to have a more direct roadway to the east than by the forced road, which took him by a round about course by the north when he was going to market at Ailsa Craig at the east; although he said he did not go there often as his principal market was at Parkhill to the west. The defendants proposed to give him a way out to the side line to the east, across the rear of lots 9 and 10, if he was not satisfied to take the benefit of the forced road; and he agreed to take that as a substitute, not only for the allowance for road in front of his land, but in place also of the use of the forced road. The defendants thereupon agreed to buy the roadway from John, the plaintiff's brother, the owner of lot 9, and from Mr. Charlton, the owner of number 10, to give the plaintiff an outlet to the said line at the east; but before the defendants could get the deed from Charlton, the plaintiff purposely, as he said, to prevent the defendants from buying it and making the roadway there, bought the site himself from Charlton, and then refused to treat with the council further about that outlet. He has, however, used it as his roadway to the east ever since. That conduct on the part of the plaintiff would, if he could otherwise have had relief by mandamus, have disentitled him to all consideration from the Court. The case then appears to be that the allowance for road is not opened opposite to the lands of the plaintiff and his brother, and it cannot be opened but at a very great expense.

The *forced road*, as it is at present, gives to the plaintiff the right of travel to the east by a line which is about three times as far as he would have to go if he were able to make use of the allowance for road from the centre of his land, or more than a mile in place of about three-eighths of a mile, or more than twice as far if he were to go by the road proposed to be given to him joining on to the forced road from the allowance for road in the front of his lot.

The road proposed to be given to him at the rear of his land across lots 9 and 10 to the side line at the east is a shorter distance and a much better road to the east than by the allowance for road, even if it had been opened for him. But he does not, he says, go much to the market at Ailsa Craig to the east, but to the market at Parkhill at the west.

In going to the west, his principal market, he does not lose one foot of ground in distance, but he complains that he has to pass along his own land until he reaches the good part of the allowance for road. If, however, he used the road proposed to be given to him which would lead on to the forced road, he would not be obliged to travel more than about a quarter of a mile further than if he got access to the allowance for road direct from the centre of his land.

The case then is that the defendants offered him a road free to the east in rear of his land which he agreed to take, but he afterwards purposely prevented the defendants from giving him that road by buying up the proposed roadway there himself.

He has it, however, for he chose to buy it, to embarrass the defendants, rather than to take it from them free. He is however in fact now served with a roadway to the east; he has not one to the west as yet, but the defendants are willing to give it to him. It will occasion him not so much as a quarter of a mile further travel in going to and from the west than it would by the regular allowance if it were opened. Is it unreasonable he should be obliged to take that offer of the defendants, or is it reasonable the defendants should be required to make an expenditure of from \$3,000 to \$5,000 to construct a difficult line of road and to maintain it afterwards? It must be an expensive roadway according to the evidence, and its maintenance would be only for the accommodation of the plaintiff and his brother.

The plaintiff at the trial made a computation by which the direct road, if made, would be shorter than the present forced road by about 3,700 feet, and the saving in main-

taining that distance of road would, it was said, make it more advantageous for the defendants to construct the allowance for road than to maintain the present line of road. How that would come out in fact is not so clear, perhaps, as was contended for. We do not feel at liberty to consider that part of the case without more satisfactory evidence than we have upon it, if even then it would be entitled to any weight.

I have stated so far that I do not think the plaintiff, upon his statement of claim, is entitled to recover upon the facts of the case as proved at the trial ; and I have stated also that I do not think the plaintiff could have succeeded in obtaining a mandamus upon the facts above stated, if he had applied for it upon these facts. The expense is great ; the object to be gained is disproportionate to the expenditure required. The plaintiff has been offered a roadway in lieu of the allowance for road, which he agreed to accept in lieu of it, but which he purposely prevented the defendants from giving to him. He has, however, by that act of his acquired a road sufficient for his purpose at the east, and he can now obtain a roadway to the west, sufficient for all his purposes, by the extra travel of a quarter of a mile, if he choose to accept of it. But if he will not accept of it or use it, he has a perfect roadway already from his own land to the west by the allowance for road, the west being his principal line of travel.

The plaintiff, however, by bringing an action for damages, and by claiming a mandamus, is asserting a right in law to have the allowance for road, at his own instance and for his own benefit, opened and put in condition by the defendants, and the question is, is he entitled to maintain such an action ?

This action, I am assuming, is to compel the defendants to open and put in a condition fit for travel the allowance for road, to *give the plaintiff access to and from his land* from that road allowance.

If he can maintain the action it must and can only be because his claim is one of that peculiar personal kind

affecting him alone, and not the public generally. If the action had been for *closing up the road* and so preventing the plaintiff from access to and from the land, an action would certainly have been maintainable, for the closing of the road would *prima facie* be a wrongful act, and his claim would be alleged to have accrued by reason of that wrongful act; *Blissit v. Hart*, Willes 508, and 74, note, T. Jones 156; *Iveson v. Moore*, Ld. Ray, 486, 12 Mod. 262; *Greasley v. Codling*, 2 Bing. 263; *Beckett v. Midland, R. Co.* L. R. 3 C. P., at p. 97, *et seq.* 262; *Winterbottom v. Derby*, L. R. 2 Ex. 316; *Benjamin v. Storr*, L. R. 9 C. P. 400.

This allowance for road was not opened when the plaintiff went into possession of his land, and it has not been opened since. The defendants have never done anything to his injury. The not opening of the road may be an omission or neglect on the part of the defendants, and prejudicial it may be to the plaintiff more than to others by reason of his land fronting upon that part of the road.

If the plaintiff can maintain an action for not opening the road, it must be, as I have said, because the defendants were and are bound to do so for the purpose of giving to him, and as a consequence to all settlers upon lands, the right of access to and from their lands, upon establishing to the satisfaction of a jury that there was and is no sufficient cause for not opening the road. If that be so, the defendants then are not to be governed by their own discretion only, but by that of an outside and very uncertain tribunal, if a jury are to constitute that Court of Appeal; and by a power not expressly authorized to control that discretion if the Court is to exercise a controlling jurisdiction in such a case.

The township council having the powers before referred to and the power to impose and levy all proper rates and taxes "for the lawful purposes of the municipality in each year" (section 361), and to make regulations, "although not specially provided for by this Act, and not contrary to law * * as the good of the municipality requires,"

(section 285), it may be contended the defendants are bound to open up all such public highways and allowances for road which "the good of the inhabitants requires," so far as such highways can properly be opened, &c., or to open, &c., other roads in lieu of those which cannot be opened but at a great or inconvenient expenditure, and not warranted by or commensurate with the object desired, and not justified or required by the wants of the locality, nor by the degree of the inconvenience complained of.

The municipality, no doubt, is bound in duty to exercise the powers vested in them for the public benefit. Their own absolute discretion in my opinion is not their only guide. The Courts have power to see that a sound discretion, and according to law, is exercised by such bodies in such matters. How far that controlling power of the Courts has been acted upon must be considered.

The main purpose of a highway is for all persons to pass and repass, on foot or with horses, carriages, etc., on their lawful and necessary business, at their free will and pleasure; and in the pursuit of such lawful and necessary business persons may pass to and from their houses and properties adjoining the highway, to and from the highway, at their free will and pleasure, and also to and from such houses, shops and other places adjoining the highway, at their free will and pleasure.

The highway is for the public accommodation not only from market town to market town, but to any place along which the highway passes. If it were not so the highway would be of little use, for no one could get from it or upon it; while all who use it must be entitled to reach their homes or places of business, or other proper places of resort to and from it.

This very elementary statement shews, I think, the occupiers of houses and properties of different kinds, who are entitled to use the highway in going to and from such houses and properties on their lawful and necessary business, must be entitled to have the necessary highways or allowances for highways made, opened, maintained and

repaired, to enable them to use such highways or allowances for highways for such purpose.

It is not mere travellers or wayfarers who are entitled to have highways made and maintained; it is the *public generally*; and the other classes of persons I have mentioned are as much as, and I should say are more entitled, to be considered in such a case than the mere wayfarer, for the reasons stated, and because also such persons are the public, and in a sense travellers and wayfarers also.

The allowances for highways throughout the Province were made by the Crown on such a plan, which shews plainly the design was to enable the settler to reach his land by a designated public road, and to reach it not merely by coming opposite to or in front of his lot, but to reach it by stepping from the highway on to it, and so leaving it or going to it at his free will and pleasure.

The occupiers of lands along the highway are the public, as much as any other class of persons, to prosecute if the highway be out of repair.

They are the public, also, as much as any other class of persons, to take proceedings for the opening of highway allowances, if the municipalities can be required to open them by compulsory proceedings. Can such compulsory proceedings be taken to oblige a municipality to open up a highway?

I am of opinion such proceedings may be taken if a proper case be made for them. If, for instance, 1, 2, 3 were concession allowances, and allowance number 1 was opened, but neither of the allowances 2 or 3, and the 3rd concession was well settled, but the only way of getting to the lands in that concession was by going along the 1st concession line, and then crossing the best way the settlers could the whole depth of the 1st and 2nd concessions, or about two and a half miles to reach their homes in the 3rd concession; it appears to me, if there were no sufficient reason against it, the municipality might, if they declined to open the 3rd concession line, be compelled to do so by mandamus.

It is true they have the discretion to do or not to do such acts, but that discretion must be wisely exercised, and if it is not, they are not the sole arbiters whether they have used their discretion wisely or not, for they are under *a duty* also in such matters.

It may be said the council would not be likely to act so wilfully. That I do not know. But if they did, it is said, then change the council by electing others who will act more wisely. But suppose that cannot be done, what then ?

The people of the 3rd concession might not be of much influence, or they might in politics, in religion, in school matters, as well as in many others, be opposed to the majority of the voters, and so could not get anything done for them. Upon a proper case being made, and there appearing to be no reason why the application should not be granted, these people would, in my opinion, be entitled to get special relief.

If land for a street in this city had been given and had been accepted by the municipal council, but for some cause which agitated the public mind, or without cause, the council would not open and improve it, although houses had been built on each side of it, and the occupants were obliged for most of their necessary purposes to get access to and from their houses by other ways ; and if there was no sufficient reason why the street should not be made sufficient for use, I think I may say in such a case, a very extreme and perhaps an almost improbable case I admit, the council would be obliged by the Court to perform its duty by making the site of the street a fit and passable roadway ; and the like law which would apply to a city must apply equally in law to a township.

The rule as to granting or refusing a mandamus is stated in *The King v. The Bank of England*, 2 Dougl. 526, by Lord Mansfield : " Where there is no specific remedy the Court will grant a mandamus that justice may be done. But where (as in this case) an action will lie for complete satisfaction equivalent to a specific relief, and the right of

the party applying is not clear, the Court will not interpose the extraordinary remedy of a mandamus."

In *The King v. The Severn & Wye R. W. Co.*, 2 B. & Al. 646, the Court granted a mandamus to the company to replace the iron tramway which they had constructed under an Act of Parliament, with a provision "that the public should have the beneficial enjoyment of the same," the Court holding it to be a public highway, as it could be used by the public in a particular mode, because the remedy by indictment is not "equally convenient, beneficial, and effectual as a mandamus * * for a corporation cannot be compelled by indictment to reinstate the road. The Court may in case of a conviction impose a fine, and that fine may be levied by distress, but the corporation may submit to the payment of the fine and refuse to re-instate the road, and at all events a considerable delay may take place;" and per Best, J., p. 651: "By a mandamus, on the other hand, the defendants will be compelled to do the thing required, unless by the return to the mandamus they shew a sufficient reason for not doing it; and if they shew no sufficient reason, then a peremptory mandamus issues, and in case of non-compliance an attachment may issue against those who disobey the writ."

The case of the *King v. The Commissioners of Dean Inclosure*, 2 M. & S. 80, was referred to in 2 B. & Al. at p. 649. In the case in 2 M. & S. 80, a party complained that the commissioners, acting under a statute, laid out a road as a private and not as a public road, and a mandamus was applied for to compel them to lay it out as a public road.

The counsel, in supporting the motion, said they "did not deny the general rule that if there be another specific legal remedy the Court will refuse to interfere by *mandamus*, but they insisted that an indictment could not properly be termed a remedy, and much less a specific remedy, *i.e.*, such a remedy as the case demands, for indictment is only a proceeding in *pœnam* for the past and not a remedy for the future." And Lord Ellenborough said he

thought these observations were very material, and that an indictment would not afford that convenient mode of remedy which might be obtained by mandamus. The Court did not say whether it had the power to order the road to be so opened or not. The motion was disposed of on other grounds.

In the *Queen v. The Trustees of the Oxford and Witney Turnpike Roads*, 12 A. & E. 427, Lord Denman, C. J., said: "I know no instance of a mandamus to repair a road."

In *Regina v. The Bristol Dock Co.*, 6 Jur. 216, 2 Q. B. 64, a mandamus was directed to a Dock Company, which was empowered by statute to make and maintain a new course for a river with equal width and depth at the bottom, and with equal inclination to the sides to the former course. Lord Denman said: "An objection was taken to the writ because it only enjoined the doing that for the nonperformance of which an indictment might be preferred; but we think that even if such an objection is not too late after the writ has issued, it is of no weight. Those who obtain an Act of Parliament for the construction and maintenance of great public works are bound in law to fulfil all the duties thereby cast on them, and may be called on by this Court so to do. If the breach of contract causes also a public nuisance that cannot dispense with the necessity of a specific performance of the obligation contracted by them."

In *Rex v. Paddington Vestry*, 9 B. & C., at p. 459, counsel in argument said, [Sugden, Solicitor-General, Alderson and Brodrick]: "An adoption of a road by the inhabitants of a parish is not necessary to make the parish liable to repair. If all the inhabitants of the kingdom [except the inhabitants of the parish on which the road is situated] had used the road, it would by such user have become a public highway, and by the common law of England would, therefore, be repairable at the expense of that portion by the public who inhabit the parish. A dedication by the owner of the soil and an adoption by the public is all that

is necessary to make a road a public highway. If the owner of the soil brought trespass against a person for passing along a road, and the latter shewed an user by the public generally, it would be no answer to shew that the inhabitants of the parish had not used it. The position laid down in *Rex v. St. Benedict*, 4 B. & Ad. 447, that an adoption of a road by this parish is necessary to make it a public highway cannot therefore be supported."

In *Rex v. Commissioners under the Cockermouth Inclosure Act*, 1 B. & Ad. 378, motion for mandamus to commissioners to set out an occupation road to two parcels of ground which the commissioners had set out to the applicant's testator. The road desired to be set out was under the General Inclosure Act, 41 George III. ch. 109. The Court refused the motion because it was made at too long a period after the application should have been made, and because the effect of it would be to reduce in value the property of others who had been so many years in possession.

There are many cases on the question, but none of them distinctly deciding that the Court will direct the opening or repair of a road unless somebody or person is obliged as a duty to do the act applied for to be done, or unless the work empowered to be done has been begun: *Regina v. Eastern Counties R. W. Co.*, 10 A. & E. 531; *Regina v. Halifax Road Trustees*, 12 Q. B. 454, 455, 457; *Regina v. London and North-Western R. W. Co.*, 16 Q. B. p. 880; *Regina v. York R. W. Co.*, 16 Q. B. p. 903; *Regina v. York and North Midland R. W. Co.*, 1 E. & B. 178, Erle, J., dissenting.

In the last case, in Error, in 1 E. & B. 858, the Court held the Railway Act "may cast the duty upon the company in one or two ways; by express words of obligation, or by words of permission only, if the duty can be clearly collected from the general provision of the whole statute, that the words of the Act, *it shall be lawful* for the company to make the road, are permissive only and not imperative; and it is a safe rule to give to the words of the

Legislature their natural meaning when absurdity or injustice does not follow from such a construction. It seems clear, therefore, the duty is not cast upon the company by the express words of the statute"; and that it is not correct to speak of the Act as constituting a contract between the company and the public; and it is not agreed that a mandamus is to be granted because the company have assumed, entered upon, or begun the work. * *

"We do not say such may not be the law. If a company empowered by statute to build a bridge over the Thames were to build one arch only, it would be well deserving of consideration whether they ought to be indicted for a nuisance in obstructing the river or for the non-performance of a duty for not completing the bridge."

In *Brooks and Haldimand* 41 U. C. R. 381, it was not argued that the application was not sustainable: the objection was because the order to show cause was, why the county should not build a bridge "at or near the village of York," while the place of erecting the bridge should have been left for the county to decide upon. Harrison, C. J., dissented from the judgment of the Court, because the county council had a "discretionary power to make laws and incur expenditure on behalf of their constituents. In the absence of unequivocal language, *combating* the discretion, there should in my opinion be no interference with it by Courts of Justice."

By the Municipal Act 1873, sec. 413, as amended by 37 Vic. ch. 16, sec. 19, (O.) it was made *the duty* of county councils to erect and maintain bridges over rivers forming or crossing boundary lines between two municipalities.

In 3 A. R. 73, the judgment in that case was reversed upon the ground that the Court was interfering with the discretion of the county council in requiring the council to build a bridge over the river; and in Appeal the objection was first taken that the demand to build a bridge at or near the village of York was a demand which the Court could not enforce; for even if the council could be directed to build a bridge, it was in their sole discretion where to build it.

I do not enquire at present whether *at or near* was taking the discretion from the county council to select the site of the bridge; at any rate under the circumstances of that case, in which it appeared the main highways on each side of the river were cut off opposite to each other at that point by the destruction of a joint stock bridge which had before connected these highways for a period of nearly twenty years. In other words, the county council might have been called upon to form a connection of these two highways by bridge for the public travel, and that could have been done only by building a bridge "at or near the village of York." I consider the case appealed from to have been reversed because the county council had an irresponsible discretion to build or not to build a bridge just as they pleased.

That doctrine of an irresponsible discretion, I understand, never was a doctrine of law, and to have been in this country wholly and properly over-ruled by the case of *Moulton and the County of Haldimand*, 12 A. R. 503; and that the Courts have the authority, which I never doubted they had, of a *controlling* power over public bodies, who have a discretionary power to be exercised such as the one now in question under the Municipal Acts. "Discretion when applied to a Court of Justice, means *sound* discretion *guided* by law. It must be governed by rule not by humour. It must not be arbitrary, vague, and fanciful, but legal and regular:" Per Lord Mansfield in *Rex v. Wilkes*, 4 Bur. 2539.

These highways concern the whole of the public, and not only the neighbourhood in which they are. In *Rex v. The Paddington Vestry*, 9 B. & C., at p. 459, counsel, *arguendo*, said (the counsel being Sugden, Solicitor-General, Alderson and Brodrick) that if user of a way constituted it a highway, that user might be by others not of the neighbourhood at all. That was the opinion I expressed in 41 U. C. R. at p. 393, and which Patterson, J. A., observed upon in 12 A. R. 537.

I shall refer to some of the provisions of the Municipal Act which are plainly permissive and to some which

appear to be obligatory, although the power to do such latter acts is expressed in the terms that the municipal council "may pass by-laws for the following purposes," which are thereby stated, and although the word *may* is to be construed as permissive by the Interpretation Act.

Under section 43, when the provisional council has procured the necessary buildings, the two councils it is said, "*may enter into an agreement for the settlement of their joint liabilities.*" Is that *permissive* only? See sec. 45. I should think it to be a right which one council could enforce against the other.

By section 451 it is said the county council *may* pass by-laws for erecting, improving, and repairing a court house, gaol, house of correction, and house of industry, and *shall* keep them in repair. Is that obligatory as to the court house and gaol? See sec. 41 by which the provisional council may build them *adapted to the wants of the county.*

By section 482, sub-sec. 2, the council *may* pass by-laws for appointing certain officers, "and other officers *as are necessary in the affairs of the corporation, or for carrying into effect the provisions of any Act of the Legislature.*" Is that permissive only?

By section 490, sub-sec. 7, it *may* pass by-laws "for draining such real property *as may be required* for the erection of public school houses thereon, and for other public school purposes," &c.

Sec. 495, sub-sec. 5, is to the like effect.

As to the public morals which are to be protected by section 490, sub-sections 29 to 37, the council may be answerable if any of the acts mentioned, and which the council has power to provide for, became a nuisance by not being provided against; but the council may not be compellable to make provision in that respect by mandamus. See also sec. 496, sub-sec. 7, as to erection or construction of slaughter houses, &c., "which prove to be nuisances."

By sec. 531 municipalities are bound to repair "every public road, street, and bridge" situate within them; and by sec. 535 to erect and maintain bridges over rivers, &c.

By section 536 township boundary lines not assumed by the county *shall* be opened, maintained, and improved by the township council, except &c. See also sections 537, 538 and 540, as to roads between other municipalities being *within the joint jurisdiction* of such municipalities.

By section 565 the county council *shall have power* to pass by-laws for opening, making, &c., roads, streets, &c.

Then as to roads, &c.

By sec. 526, subject to the provisions afterwards mentioned, every municipal council shall have jurisdiction over the original allowances for roads, highways and bridges in the municipality. See also section 527.

Are not many of these provisions by the general purview of the Act more than permissive?

Would the municipality be doing its duty by wantonly, and vexatiously refusing to open a road, &c.? I think not. An indictment, too, where it would lie could not give the specific remedy, and there is legal remedy if it cannot be had by mandamus.

There is a great difference between a private company, which has power by statute granted to it at its own instance to construct a railway for its own personal gain, and a public corporation which is created at the public instance for the general good of the public, and for the special benefit of a large section of the community, and which is endowed with large governmental powers such as these municipal bodies.

With the power to legislate on so many multifarious subjects, to levy taxes, to erect court houses and gaols, to provide for the poor, the sick, and insane, to establish markets, to provide for school houses, and for the general health, to aid agricultural societies, and mercantile businesses, to provide water and gas for the locality, to suppress all annoyances and nuisances, to protect the public; and having the sole jurisdiction over all the roads, road allowances, and highways, to open, make and maintain all roads, &c., to drain the same and also the whole locality; and, in general, it may be said to do everything for the

convenience and according to the requirements of the inhabitants, and for the peace, welfare, and good government of the community.

Possessing these powers, they must be exercised. It cannot be that they are to be suffered to lie idle or to be arbitrarily exercised at the caprice of the governing body; especially as to the roads according to the language of sections 526, 531, 535 to 538, and 565, which show something more than a mere permissive authority has been given, and which agree also with the general purview of the Act.

The inference I draw from these cases, and from the words of the Court of Exchequer in 1 E. & B. 858, that the *duty* of a body to do an act may arise under a statute, even "by words of permission only, if the duty can be clearly collected from the general purview of the whole Act," and from some of those which were cited to us, satisfies me that the municipal council is under a legal duty to open and maintain roads; that their discretion in such a case, wide, and properly wide, as it is, and as it should be, and untrammelled as it ought to be in most cases, is nevertheless a discretion which is subject to rule and the supervision of the Courts to see that it is wisely and legally exercised for the purpose for which it was granted to them. And the inference I draw from the evidence is, that upon the facts of this case the Court would not have granted a mandamus to the defendants to open the part of the road in question, although in a proper case the writ would have gone to open up a part of the original allowance, so as to connect the break in the line of a continuous road if it were for the benefit of the settlers only, although it was not otherwise for the public benefit; and that the like relief would be grantable to an occupier of land who was barred of access to his land by reason of the allowance for road not being opened to it, if he were the only person so circumstanced; but if there were several, then the remedy should not be by action; for the like principle which prevents an action being main-

ained when the injury is caused by the foundrous condition of the road, that the injury being common to all, a multiplicity of actors should not be brought, would apply equally in a case such as I am referring to, but the remedy should be by the prerogative writ of mandamus.

I cannot therefore say the plaintiff may not maintain an action for a statutory mandamus in a proper case, but he has not, I think, established such a right to it, for the case he has made he has not proved.

The jury have found adversely to the defendants in almost every respect. Among other things they found the defendants were to blame because the plaintiff had not convenient means of ingress and egress to his lot. How they could have found so, when the plaintiff after agreeing with the defendants to take a road to be found for him at the rear of his farm leading to the east, bought up the right of way there, purposely, as he said, to prevent the defendants from getting it and making him a road there, which they were willing to do, it is hard to tell.

So, if the defendants had reasonable time and opportunity to make the road fit for travel, or to provide the plaintiff some other means of ingress and egress to and from the farm, as the jury found, and did not do so, and yet acted in good faith, it is hard to reconcile with their other findings, unless with their good faith we attribute to them the most inconsistent and unaccountable conduct.

The two findings shew from the view which the defendants thus had of their liability, the jury thought they acted from mere wilfulness in not performing their duty, or that from mere incapacity they failed to understand what their duty was.

I do not think, therefore, the finding of good faith in favour of the defendants is an answer to the other findings against them, for good faith is not, I think, inconsistent with a misapprehension, or even with a misconception of what is or is not a duty. But the other answers to questions three, four, five, six, and seven, are against the evidence, and such as in my opinion the jury, as reasonable men,

should not have found, according to the rule laid down in *Solomon v. Bitton*, 8 Q. B. D. 176 ; *Webster v. Friedberg*, Weekly Notes, 10th July, 1886, p. 129 ; *The Metropolitan R. W. Co. v. Wright*, 11 App. Cas. 152.

If the case stated had been proved according to the findings of the jury as recorded, there should, I think, have been a new trial, with costs to abide the final event ; but, as I am of opinion the case was not proved, the verdict and judgment should have been and should be now entered for the defendants with costs, because upon the whole case before us we are able to dispose of the whole case.

The judgment of ARMOUR, J., was unfortunately lost after it went into the hands of the printer, but he was understood in effect to hold that sec. 531 of The Municipal Act of 1883 applied only to highways which were highways in fact as well as in law : that the allowance for road in question was only a highway in law and not in fact, and that therefore sec. 531 did not apply : that the opening of the road in question was entirely in the discretion of the council, and their discretion could not be interfered with by the Court : and that under any circumstances indictment was the only remedy ; and he, therefore, concurred in dismissing the action.

O'CONNOR, J., was of opinion that the action was sustainable in law, and the verdict supported by the evidence.

*Order nisi and motion absolute, and
action dismissed, with costs.*

[CHANCERY DIVISION.]

RE REDDAN.

The Devolution of Estates Act, 1886"—49 Vic. c. 22 (O.)—*Rights of widow of intestate—Release of dower—One-third absolutely.*

R. died intestate entitled to real and personal property leaving a widow and children.

Held, that the widow having elected to take her interest under section 4 of "The Devolution of Estates Act, 1886," 49 Vic. c. 22 (O.) was entitled to one-third of the real estate absolutely.

THIS was an application to the Court for an opinion as to the rights of a widow, and certain infants, and a lunatic under "The Devolution of Estates Act 1886," 49 Vic. ch. 22 (O.)

It appeared that one William Reddan died on July 28th, 1886, intestate, owning real and personal estate, and leaving a widow, three adult children, one of whom was a lunatic confined in the Toronto Asylum, and three infant children.

Application was made under R. S. O. ch. 220 to the administratrix by the Inspector of Prisons and Asylums for the share of the estate coming to the lunatic for his maintenance. On this being done the widow claimed under "The Devolution of Estates Act 1886," that as she was willing to release her right to dower she was entitled to one-third of the real estate of the deceased absolutely.

Application was then made to the Official Guardian under section 8 of the said Act, for his consent to a sale of the real estate, which he declined to give without the approval of the Court, in order that it might be determined whether a widow if she elected under the Act to release her dower was entitled to a third of the value of the realty absolutely, or to a life interest only in a third.

The matter was then submitted to the Court with the consent of all the parties interested, and was argued on December 6th, 1886, before Boyd, C.

John Hoskin, Q.C., the Official Guardian, for the infants.
Huson Murray, for the widow.

E. T. Malone, for the inspector, on behalf of the lunatic.

December 23, 1886. BOYD, C.—Questions arise as to the rights of the widow under proceedings taken with the privity of the Official Guardian under the late Act as to the Devolution of Estates 49 Vic. ch. 22 (O.). She elects against dower and claims a share of the land under section 4, sub-sections 1 and 2.

The effect of the Act is to abolish the distinction between real and personal property for the purposes of administration and to devolve the whole estate upon the personal representative.

No greater change has been effected in the law by any recent legislation. When its far reaching consequences are properly apprehended, it may be found that the absorption of realty by personalty tends to systematize jurisprudence in much the same way as the absorption of law by equity.

I read the 4th section as giving the widow who resigns her dower the same share in the realty that she now has in the personalty and to the same extent; that is to say, she is not restricted to a mere life estate, but takes absolutely out and out.

So far as the infants and the lunatic are concerned, it will be right to present a scheme shewing how it is proposed to deal with and divide the property in order that the Judge may see to the protection of their interests; this is also the duty devolving upon the Official Guardian under section 8 of the Act. When the sale of land in which infants are interested is proposed by the executors, it is competent for that officer to see that the minors' shares are or will be properly invested and protected. In case of doubt the matter can always be referred to the Court, and thereby proper measures taken to secure the proceeds by payment into Court or otherwise. My brother Ferguson concurs in the general results herein directed, and refers me to *Mitchell v. Richie*, 13 Gr. 445, 451, as to the care to be exercised over infant's money.

This is a proper case to allow all costs out of the estate.

[COMMON PLEAS DIVISION.]

McCASKILL V. McCASKILL ET AL.

Rent charge—Rent service—Rent seck—Charge on land—Apportionment—Notice.

On the 1st December, 1870, A. M., by deed, conveyed certain lands to his grandsons W. M. and D. M., as tenants in common; and on the same day an agreement in writing was made between the parties whereby W. M. and D. M. agreed to pay the following sums of money, and fulfil the agreement, namely, that W. M. and D. M. should thenceforward support their mother, the plaintiff, and furnish her with reasonable, suitable, and comfortable board, lodging, and clothing, and medical attendance during her lifetime, and maintain her in a proper manner; and that in the event of any disagreement between W. M., D. M., and the plaintiff, whereby she would be obliged to leave the said premises, they were to pay her \$55 a year in lieu of such board, &c., and, if not paid, to be recoverable by suit at law. The covenants, payments and annuities to be chargeable against the said land. The plaintiff was no party to the agreement. On the 4th October, 1872, the defendant W. M., for a nominal consideration of \$1000, conveyed his undivided half interest to the plaintiff; but, of which she said she was not aware; and on 1st March, 1877, she reconveyed the same to W. M. "free from incumbrances." On 12th January, 1882, D. M. sold his undivided half interest to C., and a conveyance was executed, but the sale was never carried through. On 27th September, 1883, D.M. sold his said interest to G. A. B., and, to save registration charges, the conveyance was made by C. to G. A. B. On 20th March, 1884, G. A. B. conveyed to E. and S., who in May, 1884, ejected the plaintiff from the land. The agreement was not registered until 27th January, 1882.

Held, reversing the judgment of GALT, J., at the trial, that the agreement did not create a rent charge, as no power of distress was conferred: that if either a rent service or rent seck there would be a right of distress and apportionment; but if neither, but a covenant charged on land, performance of it would be decreed: that upon the conveyance by W. M. to the plaintiff, the whole charge was not extinguished, but an apportionment took place; and that therefore defendant was entitled to enforce performance against D. M.'s undivided half interest, in the hands of E. and S., whom the evidence shewed were purchasers with notice.

THIS was an action tried before Galt, J., without a jury, at Whitby, at the Spring Assizes of 1886.

The facts were briefly these: One Allan McCaskill, by a voluntary deed, executed on 1st of December, 1870, conveyed a certain parcel of land to his grandsons, William McCaskill and Donald McCaskill, as tenants in common.

On the same day an agreement was made between the grandsons of the first part and the grandfather of the second

part, whereby, in consideration of the conveyance to them "the parties of the first part agree they should pay the following sums of money and fulfil the within agreements as follows: That is to say, that the said parties shall henceforward support their mother, Mary McCaskill (the plaintiff), and furnish her with reasonable, suitable, and comfortable board, lodging, and clothing, and medical attendance when required at all times when necessary during the remainder of her natural term of life; and that the said parties of the first part shall treat their mother at all times with proper respect and regard, and maintain her in a proper manner; and, if in the event of any disagreement arising between the said parties of the first part and their mother, so that the said mother will be obliged to leave the said premises of her sons, then the said parties of the first part shall only be obliged to pay her the sum of \$55 a year in lieu of board, lodging, clothing, and attendance; and further, it is agreed that the said several payments shall be recovered by suit at law if not paid when due. It is also hereby agreed and understood that the said covenants and payments and annuities shall henceforth be chargeable against the said lands so conveyed as aforesaid."

The plaintiff was no party to this agreement.

On the 4th of December, 1872, the defendant William McCaskill, for the nominal consideration of \$1,000, conveyed his undivided half interest to the plaintiff. (She swore she was not aware of this having been done.) This deed was registered on 7th December, 1872. On 1st March, 1877, Mary McCaskill re-conveyed the land to William McCaskill "free from all incumbrances."

The undivided interest of Wm. McCaskill was subsequently mortgaged and finally sold in a mortgage suit in the Chancery Division, to which suit Mary McCaskill was a party.

The above agreement, though dated the 1st of December, 1870, was not registered till the 27th of January, 1882.

On the 12th of January, 1882, Donald McCaskill conveyed his undivided half interest to Donald K. Campbell. It appeared from the evidence that the sale to Donald K. Campbell was never carried through. Subsequently on the 27th of September, 1883, Donald McCaskill sold his undivided half interest to George Allan Maybee, and to save registration charges, a conveyance was made by Donald K. Campbell, to whom the property had been conveyed, to the said Maybee. The last deed was in the ordinary short form with this additional clause. "And all encumbrances on the said lands must be deducted out of the said purchase money."

On the 20th of March, 1884, George Maybee conveyed to the defendants Richard Edwards and William George Smith.

It appeared from the evidence that Mary McCaskill had lived upon the property with her sons up till 1884, when she was ejected by the defendants Edwards and Smith, and since that time had not been supported by her sons.

Allan McCaskill was the father-in-law of the plaintiff Mary McCaskill, and the grandfather of Donald McCaskill.

This action was brought by Mary McCaskill against William McCaskill, Richard Edwards, and William George Smith, claiming to have a declaration that she was entitled to a lien upon the lands owned by the defendants Edwards and Smith for arrears of annuity to her under the agreement, and for future maintenance according to the terms of agreement, or that the interest of the defendants in the lands be sold and a sufficient part thereof set apart to meet the claim of the plaintiff.

The learned Judge reserved his decision, and afterwards delivered the following judgment :

GALT. J.—As respects the share of Donald McCaskill, I am of opinion the defendants Edwards and Smith had notice that plaintiff made some claim against the property.

On the argument before me Mr. Marsh raised several objections to the plaintiff's title. The most important were : 1st, that as the plaintiff was not a party to the agreement

she could not sue upon it; and, 2nd, that as she had made a conveyance of her interest in the undivided half to William McCaskill "free from all incumbrances," she was precluded from asserting any claim as against the other undivided half.

I entertain grave doubts whether, under the terms of the agreement itself, the plaintiff has any right of action, irrespective of the objection that she is no party to it. The obligation to pay a sum of money was to accrue only in case there was a disagreement between her and her sons. There was no evidence that any such had arisen. She lived in the house and on the land until she was ejected owing to the sale of the land. There is no condition in the agreement as to the effect of a sale; and it appears to me that if the plaintiff has any claim against her sons which she can enforce, she must do so by action, and I doubt very much whether she can do so: See *Tweddle v. Atkinson*, 1 B. & S. 393.

The cases cited by Mr. Tilt, however, tend to shew, that such an action may be sustained in equity, and of course now would be available in a court of law; but, as respects the defendants Edwards and Smith, I think she has no right of action. But be this as it may I am of opinion the second objection is fatal to the plaintiff's claim. The charge against the land, if any arose owing to the default of the grantees to maintain their mother, or to pay the money, was in no case a "rent service," it was a contingent obligation which might on default become a "rent charge."

In *Washburn* on Real Property, 4th ed., p. 288, it is stated, speaking of a rent charge, "so if he releases any part of the land, which is charged, the balance is wholly discharged and the rent will not be apportioned." For this numerous English authorities are cited.

I therefore give judgment for the defendants, and dismiss the action, with costs.

In Easter sittings, *McGillivray* (of Uxbridge) moved on notice to set aside the judgment entered for the defendants, and to enter judgment for the plaintiff.

During the same sittings, May 27, 1886, *Holman* supported the motion. The plaintiff only claims relief against the undivided interest in the lands owned by Donald

McCaskill and now vested in the defendants Edwards and Smith. It is clear that Mary McCaskill has not received any support for over two years. The defendants Edwards and Smith had express notice as well as from Mary McCaskill as from the registration of the agreement before the conveyance to Maybee from whom they claim. The defendants can only hope to succeed by construing the agreement as constituting a rent charge and importing the strict common law doctrine that a release of a portion of a rent charge releases the whole. The learned Judge at the trial erred in looking upon the charge provided in the agreement as a rent charge; it has none of the incidents of a rent charge; a rent charge is where the owner of land conveys his entire estate without reserving any reversion, reserving to himself an annual rent: *Leith's Blackstone*, 2nd ed., pp. 69-70; *Williams on Real Property*, 15th ed., 391; *Leith's Real Property Statutes*, p. 14; *Wharton's Law Lexicon*, tit. Rent, (Rent Charge), Annuity. A rent cannot be reserved to a stranger. The King only can do this: *Woodfall's L. & T.*, 12th ed., p. 355; *Leith's Blackstone*, 2nd ed., p. 69. No fixed time is made for payment, and there is no right of distress attached to this charge. If it is a rent charge, then a release of part is not a release of the whole: R. S. O. ch. 95, sec. 1; *Booth v. Smith*, 14 Q. B. D. 318. The disagreement referred to in the agreement was evidenced by the fact that the plaintiff was ejected from the lands. It was objected at the trial that the plaintiff was a stranger to the agreement and could not sue. Whatever may have been the rule at common law the plaintiff could certainly sue in equity: *Shaw v. Shaw*, 17 Gr. 282; *Mulholland v. Merriam*, 19 Gr. 288; 20 Gr. 152; *Cove v. Woodye*, Dyer 23 a; *Sunderland Marine Ins. Co. v. Kearney*, 16 Q. B. 925, 20 L. J. N. S. Q. B. 417, 421; *Addison on Contracts*, 7th ed., p. 28; *Touche v. Metropolitan Warehousing Co.*, L. R. 6 Ch. 671. *Re D'Angibau*, *Andrews v. Andrews*, 15 Ch. D. 242; *Gandy v. Gandy*, 30 Ch. D. 57; *Fry on Specific Performance*, 2nd ed., secs. 180, 182; *Waterman on Specific Performance*,

secs. 50, 53, 54; *Swainson v. Bentley*, 4 O. R. 572; *Roberts v. Hall*, 1 O. R. 288.

A. H. Marsh, contra. Mary McCaskill was no party to the agreement, and could not maintain an action thereunder. The test here is: was the effect of the instrument such as to make William and Donald trustees, and Mary McCaskill *cestui que trust*? If they could have released the lands without Mary McCaskill's consent then there was no trust; and they clearly could have done so here: *Re Empress Engineering Co.*, 16 Ch. D. 125, 127, 129; *Colyear v. Countess of Mulgrave*, 2 Keen 81; *Shaw v. Shaw*, 17 Gr. 282. The rule laid down is, that a third person cannot sue on a contract made by others for his benefit, even if the contracting parties have agreed that he may, and near relationship makes no difference: *Pollock on Contracts*, 4th ed., 200. The agreement here constituted a rent charge: 3 *Kent's Com.*, 12th ed., 460; 2 *Blackstone's Com. (Kerr)*, 4th ed., 36; *Co. Litt.*, 144*b*. The purchase of any part of the land puts an end to the rent charge, because a rent charge issueth out of whole and every part of the land: *Dennett v. Pass*, 1 Bing. N.C. 388; 1 *Bythewood on Conveyancing*, 4th ed., 683; 2 *Washburn on Real Property*, 4th ed., p. 288; *Clun's Case*, Tudor's L. C. on Real Property, 330, *et seq*; and for the same reason it is put an end to by a release of any part of the land: *Co. Litt.*, 148*a*; *Leith's Blackstone*, 2nd ed., p. 17. The statute, R. S. O. ch. 95, sec. 1, applies to the latter case, and the case of a purchase remains as it was before the statute: *Leith's Blackstone*, 2nd ed., p. 17. See also *Lewin on Apportionment*, p. 14, where the Imperial Statute, 22 & 23 Vic. ch. 35, sec. 10, from which our statute is taken, is discussed. Here there was a purchase by Mary McCaskill. She accepted the deed, and then conveys back again. Under sec. 81 of the Registry Act, R. S. O. ch. 111, priority of registration is to prevail unless there has been actual notice prior to registration. There was no notice to Campbell under whom we claim: *Re Floods Estate*, 13 Ir. Ch. 312. As to the appointment of a receiver: *Brady v.*

Fitzgerald, 12 Ir. Eq. 273. There was no right to sue in the absence of a personal representative.

Holman, in reply. The right to sue in the absence of a personal representative was established in *Mulholland v. Merriam*. The right to sue is clear. See in addition to the previous authorities: *Re Flavell*, *Murray v. Flavell*, 25 Ch. D. 89. There is no evidence that the deed from William McCaskill to Mary McCaskill was ever delivered, and delivery is essential to a valid conveyance: *Leith's Blackstone*, 2nd ed., 341. The agreement is a covenant running with land binding on the assigns though not named: *Leith's Blackstone*, 2nd ed., p. 369. Though in *Leith's Blackstone* it is suggested that the release of a rent charge by a conveyance to the person entitled to the benefit thereof is not within the provisions of R. S. O. ch. 95, sec. 11, a different view was taken in *Lewin on Apportionment*, p. 14.

September 11, 1886. ROSE, J.—I am of opinion that the agreement in question did not creat a rent charge, for the reason, amongst others, that it did not confer a power of distress to recover the annuity: *Litt.*, sec. 218; *Clun's Case*, *Tudor's L. C. on Real Property*, 3rd ed., p. 293.

Assuming it to be rent service, there would be right of distress: *Clun's Case*, *Tudor*, p. 292, and apportionment, pp. 310-330.

Assuming it to be rent seck there would be distress by Stat. 4 Geo. II. ch. 28; *Clun's Case*, *Tudor*, p. 293, "as in case of rent reserved upon lease."

In the case of rent reserved upon lease, upon surrender by the lessee for life, or for years of part of the land to the lessor, the rent would be apportioned: *Clun's Case*, *Tudor*, p. 310; *Woodfall*, L. & T., 12th ed., p. 374. And a right to distrain for such apportioned sum would also remain; and, if so, the rent would of course not be extinguished. It may be it ranks under neither, but is a covenant charged upon land and enforceable by the Court with performance

I am of the opinion, therefore, that upon the conveyance.

by William to his mother an apportionment took place, and that the whole charge was not extinguished.

The plaintiff therefore had the right to enforce performance of the agreement as against Donald and his undivided half interest in the land subject to the apportionment; and also the right to enforce it against such interest in the hands of the defendants Edwards and Smith, who by mesne conveyance took from Donald unless they were purchasers without notice.

I think there is ample evidence of notice to Campbell, knowledge by Maybee, and notice in the deed itself to the defendants.

I am therefore of the opinion that the plaintiff is entitled to have the agreement enforced as against the undivided half interest of Donald McCaskill in the land which became vested in the defendants Edwards and Smith, *i.e.*, say from May, 1884, when she left the land until this date, say at the rate of \$27.50 per annum.

I have dealt thus briefly with the matter before us, not considering the form of relief, as we were informed on the argument that the whole contention had resolved itself into one as to costs.

As the substantial issue has been found against the defendants Edwards and Smith they should, I think, pay the costs.

No relief was asked against William McCaskill, nor did he appear to ask for costs.

CAMERON, C. J., and GALT, J., concurred.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

TODD V. DUN, WIMAN & CO., AND CHAPMAN.

Libel—Mercantile agency—Privilege.

In an action of libel it appeared that the defendants D. W. & Co., the proprietors of a mercantile agency, wrote to the defendant C. requesting him to advise them confidentially of the plaintiff's standing and responsibility for credit, stating that plaintiff "claimed that his premises had been burglarized;" that he had lost from \$1,200 to \$1,600, asking if this were so, for full particulars, and whether there was not something wrong. The defendant C. replied: "I have made enquiry and find that the general opinion is that he was not robbed at all, and what has been done he has done himself; at all events, if he was robbed, it is of not more than \$100 or \$200; circumstances are against him; still I cannot say." The defendants D. W. & Co., subsequently issued a printed circular or notification sheet, on which, after the plaintiff's name, were the words: "If interested, enquire at office." This was published and circulated amongst the defendants' customers, some 800, in Canada and the United States, not more than three or four of whom had any interest in the plaintiff's affairs. The circular also contained the following: "The words 'If interested enquire at the office,' do not imply that the information we have is unfavourable. On the contrary, it may not unfrequently happen that our last report is of a favourable character; but subscribers are referred to our office because in justice to them, the parties reported, and to ourselves, the information can only be properly conveyed to those entitled to receive it by the full report, as we have it on our records." It was proved that the words: "If interested," &c., had the effect of injuring the plaintiff. No attempt was made by C. to prove that the statements made in his letter were true, or that he had made enquiry and found the general opinion to be as stated. The jury found for the plaintiff.

Held, that the words charged were clearly libellous, and there was no privilege; for as to D. W. & Co., the Court was governed by *Lemay v. Chamberlain*, 10 O. R. 638, it being proved that the notification sheet was sent to all subscribers whether interested in the plaintiff's affairs or not; and the explanatory statement did not affect the matter; and as to C. his failure to prove the truth of his statements, or his belief in their truth, deprived him of any privilege.

THE statement of claim set out that the plaintiff, at the time when the matters complained of were done, was, and still is a tradesman carrying on the business of grain and general merchant, at the village of Goodwood, in the county of Ontario. The defendants, Dun, Wiman & Co., are the proprietors of a mercantile agency in the city of Toronto, and the defendant Chapman is a grain merchant in Goodwood, and was also employed as an agent by the other defendants to obtain information

for them. The charge in the statement of claim against Chapman was that he, on or about the 17th (?) November, 1883, falsely and maliciously wrote and published of, and concerning the plaintiff, in relation to his said business, the words following, that is to say: "I have made enquiries, and find that the general opinion is, that he (meaning the plaintiff), was not robbed at all, and what has been done he has done it himself; at all events, if he was robbed it is not more than \$200 or \$300. Circumstances are against him; still I cannot say," whereby the plaintiff sustained damage.

Then followed two charges of libel against the other defendants; but, as it was conceded by the learned counsel at the trial, that there was not evidence to sustain the first, it is unnecessary to refer to it.

The second was as follows: The defendants, Dun, Wiman & Co., on or about the 21st November, 1883, falsely and maliciously caused the plaintiff's name to be inserted in a certain circular or notification sheet, printed and published by the said defendants in Toronto, with the words, "if interested enquire at office," after his name, and published and circulated the said sheet among their subscribers, and among the customers of the said plaintiff, and others throughout the United States and Canada; and the plaintiff says that the said words "if interested enquire at office," had a well-known meaning in the mercantile community, and amongst the subscribers of the said agency, and were intended to convey, and did in fact convey to the persons receiving the said circular or notification sheet, notice that the said defendants possessed information regarding the plaintiff, which injuriously affected his business standing, his credit, and his reputation," whereby he was injured.

The jury found a verdict for plaintiff, with \$100 damages against Dun, Wiman & Co., and \$25 against Chapman.

In Easter sittings, *Lash*, Q. C., obtained an order calling on the plaintiff to shew cause why the action should not be dismissed, or a new trial had between the parties.

During Easter sittings, May 28, 1886, *Osler*, Q.C., *Lash*, Q.C., and *A. Macdougall*, supported the order. The information given by Chapman was privileged. It was not information volunteered by him, but given only after enquiry, which enquiry was made after a customer had asked for information. The plaintiff must not only shew that the report was false, but that Chapman knew it to be false, *i. e.*, malice must be shewn. There was no excessive language used: *Clark v. Molyneux*, 3 Q. B. D. 237. Then as to the defendants Dun, Wiman & Co. The words complained of are: "If interested, call at office." These words are not libellous in themselves. But moreover there is a variance between the libel pleaded and that proved in evidence, and no amendment has been asked. The document contains words stating that the words complained of do not imply that the report will be of an unfavourable character, but that it may be just the reverse. There are many merchants who have been very weak, and circumstances have arisen to put them in a more sound financial condition, and in such a case the report instead of being unfavourable, would be favourable. The plaintiff wishes the Court to assume that because nine out of ten merchants fail, the report must necessarily be unfavourable. The document must be construed by the Judge, and therefore should not have been left to the jury. The document being in well known and intelligible English and in no way obscure, secondary evidence was not admissible to explain its meaning: *Odger on Libel and Slander*, 538; *Capital and Counties Bank v. Henty*, 5 C. P. D. 514; *Mulligan v. Cole*, L. R. 10 Q. B. 549. The occasion was one of privilege, and no malice is shewn. It clearly appears that this is a legal and necessary business: *Cosgrave v. Trade Auxiliary Co.*, 8 Ir. C. L. (1875) 349; *Waller v. Loch*, 7 Q. B. D. 619; *Fleming v. Newton*, 1 H. L. Cas. 363; *Locke v. Bradstreet Co.*, 22 Fed. Rep. 771; *Kingsbury v. Bradstreet Co.*, 35 Hun N. Y. 212. The case of *Lemay v. Chamberlain*, 10 O. R. 638, is distinguishable from this case, for here the

notification sheet was only shewn to defendants' subscribers who would be interested in acquiring the information.

Ritchie, Q. C., and *McGillivray* (of Uxbridge), contra. There was no privilege as regards the defendant Chapman. The rule in these cases is, that where a person applies for information of the character applied for here he must represent he has an interest, and the person giving the information must *bonâ fide* believe he has such interest. The defendants Dun, Wiman & Co. had not such an interest in making the enquiry as would render the reply privileged. Where the statements are untrue the defendants must shew *bona fides*, and it was proved here that the statements were false. The question is one for the jury, and they having found for the plaintiff the verdict cannot be disturbed. It is important that these correspondents should be held to strict account: *Roscoe's N. P.*, 15th ed., 792, and *Perry v. East*, cited there; *Blagg v. Sturt*, 10 Q. B. 899. Then as to the defendants Dun, Wiman & Co., there is nothing in the objection as to the variance. The additional words were given in evidence at the trial, and went to the jury. An amendment was asked for at the trial, and will be made now, if necessary. The words, however, do not make any material alteration. The question as to their meaning is for the jury, and they have found that they were calculated to injure the plaintiff. The case of *Cosgrave v. Trade Auxiliary Co.*, 8 Ir. C. L. R. 349, is distinguishable. There the additional words did not come before the jury. There was no privilege. This case is not distinguishable from *Lemay v. Chamberlain*, 10 O. R. 638. It was proved here that this notification sheet was sent to all the subscribers whether interested or not: *Article* in 21 Alb. L. J. p. 443; *Getting v. Foss*, 3 C. & P. 160; *Taylor v. Church*, 4 Selden N. Y. 452; *Sunderlin v. Bradstreet Co.*, 46 N. Y. 188; *Williamson v. Freer*, L. R. 9 C. P. 393; *Holliday v. Ontario Farmers Mutual Ins. Co.*, 1 A. R. 483; *Erber v. Dun*, 12 Fed. Rep. 526; *Carsley v. Bradstreet Co.*, 2 Montreal R. 33.

Osler, Q. C., in reply.

September 11, 1886. GALT, J.—I propose to consider the case against the defendants Dun, Wiman & Co. first.

At the trial the learned Chief Justice held himself concluded by the case of *Lemay v. Chamberlain*, 10 O. R. 638, so far as the question of privilege was concerned, because it was proved that the "notification sheet" was sent to all subscribers whether they had any interest in the affairs of the plaintiff or not.

In that case the learned Chief Justice of the Queen's Bench Division, after reviewing a number of authorities, says, at p. 647: "The difference between such cases and the present is, that the communication complained of in this action is to many persons between whom and the plaintiff there is no dealing or privity whatever, and the more numerous the defendants' customers are the more is the plaintiff needlessly and mischievously harmed."

The same observation applies to the present case.

From the evidence given it appeared that there were about 800 subscribers, and it did not appear that more than three or four had any interest whatever in the plaintiff.

Mr. Osler contended, however, that the libel set out, viz., "if interested enquire at office," was not a true statement, because in the same sheet there is an express notification "that the words, 'if interested enquire at the office,' inserted opposite names on this sheet, do not imply that the information we have is unfavorable. On the contrary it may not infrequently happen that our last report is of a favorable character, but subscribers are referred to our office, because, in justice to them, the parties reported, and to ourselves, the information can only be properly conveyed to those entitled to receive it by the full report as we have it in our records."

It appears to me that such a notification will not if the words, "if interested enquire at the office," are in themselves calculated to damage the plaintiff render the general publication privileged. Why should the defendants call attention to the plaintiff whether their information be or be not of a favourable character? such an intimation is calcu-

lated and intended to warn all subscribers to "inquire at the office" before having any further dealings with the person thus distinguished. It was a question for the jury as to the meaning to be attached to these words, and if, on the evidence, they were of opinion that they were calculated to injure the plaintiff, the publication was libellous..

One of the cases cited by Mr. Ritchie, viz., *Erber v. Dun*, 12 Federal Reporter, 526, is exactly like the present. It was an action against a Mercantile Agency Company—I am not sure whether it is the same as the present,—where the whole question is fully considered. The words complained of are the same, "call at office," opposite the plaintiff's name. The learned Judge by whom the judgment of the Court was delivered, after citing numerous authorities, which, although not binding on us, are entitled to great respect, says, at p. 538: "This daily notification sheet was sent to all the subscribers to the agency in St. Louis without regard to the question whether they had any interest in the defendants" (*q* plaintiffs) "or their business. As a matter of fact not one per cent. of the subscribers to whom it was sent had such interest. It is too clear for argument that if this sheet contains a libel on the plaintiffs, the defendants cannot avail themselves of the plea that it was a privileged communication. Whether there is anything in it that constitutes a libel on the plaintiffs will be left for the jury to determine under appropriate instructions."

This was done by the learned Chief Justice in the present case, and the jury have by their verdict found that these words: "if interested, inquire at office," set opposite the plaintiff's name, were calculated to injure him, and were consequently a libel.

The cases cited by Mr. Osler and Mr. Lash of *Cosgrave v. Trade Auxiliary Co.*, 8 Ir. C. L. R. (1875) 349, and *Fleming v. Newton*, 1 H. L. Cas. 363, tend only to show, what is not denied, that such an association as that of the defendants Dun, Wiman & Co., is a legal and valuable institution. As to the other cases, they had reference only to the particu-

lar circumstances, and do not affect the decision of the question now before us.

In my opinion this rule, so far as concerns Dun, Wiman & Co., should be discharged.

Then as to the case against defendant Chapman. The case set out in the statement of claim is not correct. The publication therein complained of was not as would thereby appear, a letter written by him of his own mere motion, but was shewn by the evidence to have been a reply sent by him to the defendants Dun Wiman & Co., in answer to a letter from them. Chapman was their agent at Goodwood.

The letter to which it was an answer was as follows :—

“TORONTO, Nov. 20, 1883.

(Printed.)

“Be good enough to advise us confidentially at your earliest convenience of the standing and responsibility for credit of the following names :

(Written.)

“J. A. Todd. G. S., Goodwood.

“Claims to have been burglarized and to have lost \$1,200 to \$1,600. Is this so ? Full particulars. Is there not something wrong ?”

The defendant replied : “I have made inquiry and find that the general opinion is, that he was not robbed at all, and what has been done he has done it himself ; at all events, if he was robbed, it is of not more than \$200 or \$300. Circumstances are against him ; still I cannot say.”

This letter or rather reply is that on which this action is brought. The only defence pleaded by Chapman was a joint defence denying all the allegations in the statement of claim, and a several defence denying that the alleged information was given by him.

There is no plea of justification, nor of privilege.

At the trial the above report was proved to have been written by him. It was then urged by his counsel that it was privileged, and that no action could be sustained with-

out proof of malice. The learned Chief Justice, for the purposes of the trial and to avoid further litigation, in case the Court should be of opinion that the communication was not privileged, overruled the objection, but expressed no opinion as to its validity.

On the argument of this rule it was contended that the letter in question being in reply to an express inquiry on the part of the other defendants, whose business it was to acquire information respecting the standing and character of persons engaged in mercantile business, and as the plaintiff himself had published the fact of a burglary having been committed by which he had sustained a serious loss, it was the duty of Chapman, as their agent, to furnish them with such information as he could, more especially as it was understood to be "confidential."

I have considered this case with much anxiety, as it is one of great public importance. During the trial a gentleman, who is manager of the Bank of Ontario in Toronto, was called as a witness. In answer to the question, "could the business of the country be carried on now without the aid of these Mercantile agencies?" he replied, "I do not think it could without very great inconvenience. They are generally admitted to be almost necessary. It is a strong word to use to say 'necessary.' We have to make enquiries; they are a principal vehicle for making enquiries."

It appears to me from the evidence that such an association is not only legal, but may be said to be "almost necessary."

If this be so, then, as it is manifest it cannot possibly be carried on except through "information" supplied by agents, in my opinion, such communications would be privileged; but, as said by Cockburn, C.J., in the case of *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 94, at p. 102, "To entitle matter, otherwise libellous, to the protection which attaches to communications made in the fulfilment of a duty, *bona fides*, or, to use our own equivalent, honesty of purpose, is essential; and to this, again, two things are

necessary, 1, that the communication be made not merely in the course of duty, that is, on an occasion which would justify the making it, but also from a sense of duty; 2, that it be made with a belief of its truth."

Upon reading the subject matter of this suit there can be no doubt it was calculated very severely to affect, not only the business standing of the plaintiff, but his character as an honest man. Moreover, when it was written the defendant was aware of the object for which it was required, and that it would be used by parties interested in the conduct and standing of the plaintiff.

Under these circumstances, before the defendant can avail himself of what may be called a qualified privilege, for it is certainly not an absolute one, he should be prepared to prove that his allegations were true, that is, that he had made enquiry, and found the general opinion to be as stated. Now in this case, Chapman reports, "that he had made inquiry and found that the general opinion is, he was not robbed at all, and what has been done he has done it himself;" but at the trial no evidence whatever was given by him as to any inquiry or as to any "general opinion."

In my judgment this want of evidence disentitles him to any protection under "privilege;" and therefore this rule should be discharged.

CAMERON, C. J., and ROSE, J., concurred.

Rule discharged, with costs.

[COMMON PLEAS DIVISION.]

REGINA v. MARTIN.

Criminal law—Conviction for beating drum on public street—Omission to state without just or lawful excuse—Unusual noise—Noise calculated to disturb—Creating a disturbance.

A conviction was, that the defendant did, on the 16th May, 1886, create a disturbance on the public streets of the village of L., by beating a drum, &c., contrary to a certain by-law of the village. The information was in like terms except that the act was laid as done on Sunday. The by-law was passed under 47 Vict. ch. 32, sec. 13 (O), whereby power was given to pass by-laws, (sub-sec 12,) "for regulating or preventing the ringing of bells, blowing of horns, shouting, and other unusual noises or noises, calculated to disturb the inhabitants." The by-law was, "the firing of guns, blowing of horns, beating of drums, and other unusual or tumultuous noises in the public streets of L., on the Sabbath Day, are strictly prohibited." The only evidence was that given by a person who said he "saw" the defendant "playing the drum on the streets of L." on the day in question.

Held, that the conviction was bad in not alleging that the beating of the drum was without any just or lawful excuse.

Seemle, that it could not be inferred from the evidence that the drum made any unusual noise, as the witness did not say he heard any noise, but only that he saw the defendant beating a drum.

Seemle, also, that the words used in the statute that the noise made must be "calculated to disturb the inhabitants," and in the conviction that the defendant "did create a disturbance by * * the beating a drum," were not equivalent terms.

MOTION to quash a conviction.

The conviction was, that the defendant did, on the 16th of May, 1886, create a disturbance on the public street of the village of Lakefield, by beating a drum, tambourine, &c., &c., contrary to a certain by-law of the village. The penalty imposed was \$1 and costs; and, if not paid, it was to be levied by distress of goods; and if there was not sufficient distress the defendant was to be imprisoned for ten days.

The information was in the like terms, excepting that the act was said to have been done on Sunday, the 16th of May.

The by-law was passed under 47 Vic. ch. 32, sec. 13, (O.) by which the village had power to pass laws for several named purposes; and, among them, by sub-section 12, "for regulating or preventing the ringing of bells, blowing

of horns, shouting, and other unusual noises, or noises calculated to disturb the inhabitants."

And the by-law was: "The firing of guns, blowing of horns, beating of drums, and other unusual or tumultuous noises on the public streets of Lakefield on the Sabbath day, are strictly prohibited."

The evidence given against the defendant by the only witness who was examined, was as follows: "I saw him playing the drum on the streets of Lakefield last Sunday morning."

The counsel for the defendant contended that no offence was proved.

On October 15, 1886, *Aylesworth* supported the motion. *Pousette*, Q. C., contra.

October 22, 1886. WILSON, C. J.—The beating of a drum may make an unusual noise, and a noise calculated to disturb the inhabitants. And it may also make an unusual or tumultuous noise.

Playing a drum may be by beating it. The information and conviction both state the beating of a drum by the defendant which created a disturbance on the public streets.

The question is whether the conviction states an offence?

Is it contrary to the by-law to beat a drum on Sunday morning on the public streets of Lakefield, which created a disturbance?

In *Fletcher v. Calthrop*, 6 Q. B. 880, Lord Denman, C. J., said, at p. 890: "Where a certain act is made punishable by summary conviction, which act may be lawful if performed under certain circumstances, these circumstances ought to be negatived in the conviction."

Now a *disturbance* may be created on a Sunday in the public streets by beating a drum as in the case of a fire to warn the people of their danger, or the breaking of a dam which threatened the safety of the village by the rush of the water, or the like.

I take a famous and well known passage as an illustration, and not as an authority: "I am not of the opinion of those gentlemen who are against disturbing the public repose. I like a clamour when there is abuse. The fire bell at midnight disturbs your sleep, but it keeps you from being burned in your bed. The hue and cry alarms the country, but it preserves all the property of the province. All these clamours aim at redress. But a clamour made merely for the purpose of rendering the people discontented with their situation without an endeavour to give them a practical remedy is indeed one of the worst acts of sedition:" *Burke's* speech on the motion to bring in a bill for explaining the powers of juries in prosecutions for libels.

The law was, I think, strained too far in the following case in favour of the defendant. The statute prohibited travelling on Sunday, unless for the purpose of religious worship or of necessity; and the Supreme Court held that a person attending a clairvoyant exhibition where there was to be rope-dancing, and for which a charge was made for admission, was attending a religious service: *Feital v. Middlesex R. W. Co.*, 109 Mass. R. 398.

The conviction, in my opinion, should in this case have alleged that the beating of the drum was without any just or lawful excuse.

I refer also to *Rex v. Corden*, 2 Burr. 2279; *Rex v. Barton*, 1 Moo. C. C. 141; *Rex v. Jones*, 4 B. & Ad. 345; *Regina v. Johnson*, 8 Q. B. 102.

I think the Justice could not infer from the evidence given here that the drum made in fact any unusual noise. The witness does not even say he heard any noise; he says only he saw the defendant beating a drum.

Then the conviction states that the beating of the drum by the defendant created a disturbance. The words of the statute are, that the noise made was "*calculated* to disturb the inhabitants." *Calculate* is a word, which it is said, mostly refers to the future—and it is frequently used with the meaning *to intend* or *to expect*, a certain event or act. It is in this latter or irregular sense the word is used

in the statute ; or perhaps it was used as meaning the making of a noise which would *be likely* to disturb the inhabitants, whether so intended or not by the performer, in which case, I think it should have been averred, that the person beating the drum well knew that the noise would disturb the inhabitants.

The statute speaks of *disturbing the inhabitants*. The conviction is, that the defendant, by the noise, *created a disturbance*. Are these equivalent terms ? I think not. *Disturbing the inhabitants* is annoying them—as by making a noise which interferes with the thoughts or proceedings of others. But creating *a disturbance* applies either to raising a clamour, commotion, quarrelling, or fighting. The former seems to apply to the comfort or convenience of the *inhabitants*. The latter, to a breach of the peace or something like it. The disturbance should be of the nature of a nuisance : *Thomson v. Mayor, etc., of Croydon*, 16 Q. B. 708.

The case of *Regina v. Nunn*, 10 P. R. 395, decided by my brother Rose, is also a very important one.

I think the conviction must be quashed, but without costs, and subject to the condition that no action be brought.

Conviction quashed.

[COMMON PLEAS DIVISION.]

STEVENSON V. TRAYNOR.

Assessment and taxes—Taxes in arrears for three years—Evidence of arrears prior to patent—Tax sale—Onus of proof.

On 21st October, 1880, land was sold for taxes for the years 1877 and 1878, and on 15th November, 1881, a tax deed executed. The patent from the Crown issued in 1878. There was no evidence as to the right of the patentee of the land previous to the issuing of the patent, nor that the Crown Lands Commissioner had made any return to the treasurer of the land having been treated as a free grant, sold or agreed to be sold by the Crown, under sec. 106 of R. S. O. ch. 180, so as to render it liable to be assessed prior to the year 1878.

Held, there not being any taxes proved to be in arrear for three years as required, the sale and tax deed were invalid.

At the trial the plaintiff produced his patent. The defendant, in answer thereto, put in the tax deed.

Held, that the plaintiff by production of his patent made out a *prima facie* case, and the defendant, relying on his tax deed, was bound to prove the sale and arrears for three years, that is, that some portion thereof was in arrear for three years.

THIS was an action of ejectment tried before Galt, J., without a jury, at Orangeville, at the Spring Assizes of 1886.

The plaintiff claimed title under a patent from the Crown, granted on the 15th June, 1878.

The defendant asserted title under a tax deed, executed by the warden and treasurer of the county of Grey, dated 10th November 1881, made in pursuance of a sale for taxes held on 21st October, 1880.

The taxes for which the ninety acres in question were sold were \$1.13 on lot 13, in the 9th concession, of the township of Melancthon, for school rate in 1877, and \$1.00 for 1878.

The additional evidence, as far as material, is set out in the judgment.

The learned Judge reserved his decision, and subsequently delivered the following judgment:

GALT, J.—There was no evidence as to the right of the plaintiff to the land in question previous to the issu-

ing of the patent which was granted on 15th June, 1878, up to which time the title was in the Crown.

It was not shewn that the Crown Lands Commissioner had made any return to the treasurer of this land having been "located as a free grant, sold or agreed to be sold by the Crown" under sec. 106 of R. S. O. ch. 180, so as to render it liable to be assessed previous to the year 1878.

It is plain that so long as the title was in the Crown, and the land had not been located as free grant, or sold or agreed to be sold it was not liable to be assessed. The plaintiff, in his replication, expressly alleges "there were no taxes due for or in the third year in which the sale took place."

By section 108 the treasurer is to furnish to the clerk of each municipality (except cities and towns) a list of all the lands in his municipality in respect of which any taxes have been in arrear for the three years next preceding the first day of January in any year. These are the lands liable to be sold.

In the present case if the title of the plaintiff accrued on the issuing of the patent, then the taxes would have been in arrear only for the years 1878 and 1879, and the sale is void.

I give judgment in favor of the plaintiff, with costs.

There were several other objections taken by Mr. Laidlaw on behalf of the plaintiff to the validity of the sale which were argued by Mr. Clarke for the defendant; but as I consider the first,—viz., that no patent had issued when the tax for 1877 was imposed, and therefore that the land was not liable for taxes—is valid, it is unnecessary to consider them.

In Easter sittings, *J. B. Clarke*, moved on notice to set aside the judgment entered for the plaintiff, and to enter judgment for the defendant.

During Michaelmas sittings, *J. B. Clarke* supported his motion.

Laidlaw, Q. C., contra.

December 24, 1886. ROSE, J.—The defendant contended before us that upon producing the tax deed the onus lay upon the plaintiff to shew that no taxes were in arrear for three years prior to the sale, and not on the defendant to

establish the arrears; and relied on the 156th section of R. S. O. ch. 180.

That section validates a deed if not questioned within two years from the time of sale "wherever lands are sold for arrears of taxes and the treasurer has given a deed for the same."

It is plain that not only must a deed be produced, but it must appear that the lands have been sold, and sold for arrears.

I should have thought it likewise equally clear, but that some very learned Judges have entertained a different opinion, that such arrears must mean arrears entitling the treasurer to sell the lands, *i.e.*, arrears some portion whereof had been due for at least three years.

Reference to section 155 seems to give strength to such view.

It is: "If any tax in respect of any lands sold by the treasurer in pursuance of and under the authority of "The Assessment Act of 1869," or of this Act, has been due for the third year or more years preceding the sale thereof, and the same is not redeemed in one year after the said sale, such sale and the official deed to the purchaser of any such lands (provided the sale be openly and fairly conducted), shall be final and binding upon the former owners of the said lands, and upon all persons claiming by, through or under them, it being intended by this Act, that all owners of land shall be required to pay *the arrears of taxes due thereon within the period of three years*, or redeem the same within one year after the treasurer's sale thereof."

And then follows the 156th section, "Wherever lands are sold for *arrears of taxes*," &c.

I am glad to find that the majority of the Judges of the Supreme Court took that view in *McKay v. Chrysler*, 3 S. C. R. 436, *i.e.*, Fournier, Henry, and Gwynne, JJ. Strong, J., dissenting, and Ritchie, C. J., expressing no opinion.

The opinions of various Judges of the Courts of this Province are therein referred to.

I am of the opinion that when the plaintiff produced his patent, his *primâ facie* case was made out; and when the defendant relied on his tax deed in answer he was bound to prove the sale and arrears for three years, that is that some portion thereof was in arrear for three years.

It is clear that while land is in the Crown it is not assessable: R. S. O. ch. 180. sec. 6, sub-sec. 1; and only becomes so assessable after being patented or sold, or agreed to be sold or located as a free grant, when it becomes liable to taxation from the date of such sale or grant: R. S. O. ch. 180, sec. 126.

No evidence of its becoming so liable to taxation having been furnished the *primâ facie* case of the plaintiff remained undisplaced, and the judgment was quite right.

The motion fails, and must be dismissed, with costs.

CAMERON, C. J., and GALT, J., concurred.

Motion dismissed.

A DIGEST

OF

ALL THE CASES REPORTED IN THIS VOLUME.

BEING DECISIONS IN THE

QUEEN'S BENCH COMMON PLEAS AND CHANCERY,
DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

ACTION.

For breach of contract to do work
—Necessary evidence.

See CONTRACT, 3.

ADMINISTRATION.

Administration order—Statute of
Limitations—Debtors to estate.

See WILL, 5.

AGREEMENT.

Covenant not to dispose of business
—Transfer by firm to covenantor—
Acceleration of payment of promis-
sory note.

See COVENANT, 3.

APPOINTMENT.

Sale of land—Rent service—Rent
seck.

See SALE OF LAND, 2.

Will—Power to appoint among
children—Appointment to one ex-
clusive of the others—Invalids.

See WILL, 5.

ARBITRATION AND AWARD.

1. *Arbitration and award—Consoli-*
dated Municipal Act, 1883—Arbi-
tration clauses—By-law appointing
arbitrator—Sufficiency of—Arbitra-
tor refusing to act, award by other
two—Revoking arbitrators' authority
—Appointment of third arbitrator by
judge—Meeting of arbitrators within
twenty days—Oath.]—A township
by-law after reciting that there was

a difficulty with S. "from alleged damage from water flowing from local drains known as the H. and S. drains," enacted that F. was appointed arbitrator for the township. The notice given by the reeve to S. was, "the corporation has elected that the claims made by you for damages to the east half of lot 11," &c., "on account of the construction of the drain from P. to the S. drain, or consequent thereon, shall be referred to arbitration." Before the parties had been heard on the merits, the plaintiff's arbitrator withdrew from the arbitration and refused to act; but the other two arbitrators notwithstanding proceeded with the reference and made an award.

Held, that the reference was wholly informal, the subject thereof not being properly defined; and though the notice given by the reeve to S. would make the matter sufficiently clear it could not affect S. for he never entered upon the arbitration, but repudiated the arbitrators' authority at the first meeting of which he had notice; but, even if the reference were sufficient, the award was bad by reason of the two arbitrators proceeding alone, the Municipal Act requiring (in the absence of a special agreement to refer) that there shall be three arbitrators continuing to act from the time of appointment until the award has been made, and enabling the County Court Judge to appoint another arbitrator in the place of one refusing or neglecting to act.

Quære, whether it was in the power of either party to the reference to revoke the authority of the arbitrators.

Semble, that the provisions in the statute that the arbitrators must hold their first meeting within twenty days from the appointment

of the last arbitrator is not imperative, but directory, merely; and therefore an omission to hold such meeting within such time would not invalidate an award made within the month as required by the Act.

Semble, also, that the County Judge may appoint the third arbitrator *ex parte* although this is not desirable; and that the power to appoint does not depend on the disagreement of the two arbitrators, but on their failure to agree within the seven days limited therefor.

It was objected that the arbitrators had not taken the oath required by the statute; but, *Semble*, this objection was not tenable, as the oath they took was substantially the same as that required. *In re Smith and The Corporation of the Township of Plympton*, 20.

ASSESSMENT AND TAXES.

1. *Sewer rates—Personal charge—42 Vic. ch. 31, sec. 35 (O.)*—Sewer rates charged under by-law 468 of the City of Toronto prior to the coming into force of 42 Vic. ch. 31, sec. 25 (O.), (March 11th, 1879,) form a personal charge only, the said enactment not being retrospective. *Re Armstrong*, 457.

2. *Taxes in arrears for three years—Evidence of arrears prior to patent—Tax sale—Onus of proof.*—On 21st October, 1880, land was sold for taxes for the years 1877 and 1878, and on 15th November, 1881, a tax deed executed. The patent from the Crown issued in 1878, There was no evidence as to the right of the patentee of the land previous to the issue of the patent, nor that the Crown Lands Commissioner had made any return to the

treasurer of the land having been treated as a free grant, sold or agreed to be sold by the Crown, under sec. 106 of R. S. O. ch. 180, so as to render it liable to be assessed prior to the year 1878.

Held, there not being any taxes proved to be in arrear for three years as required, the sale and tax deed were invalid.

At the trial the plaintiff produced his patent. The defendant, in answer thereto, put in the tax deed.

Held, that the plaintiff by production of his patent made out a *prima facie* case, and the defendant, relying on his tax deed, was bound to prove the sale and arrears for three years, that is, that some portion thereof was in arrear for three years. *Stevenson v. Traynor*, 804.

3. *Tax sale — Improper assessment—Payment of taxes—Non-resident lands—Admissibility of evidence to correct non-resident roll.*]

H. being the owner of four islands called them O. F. B. & C. islands, and improved O. by building a house, &c., on it. O. had previously been sometime known as Island D., and was described by that name in the patent. H. ascertained what taxes he owed, and paid all that were demanded. The assessor from general information assessed the islands, and so assessed Island D. on the non-resident roll for the years in question. The taxes were not paid on Island D. as assessed on the non-resident roll, and it was consequently sold at a tax sale.

In an action by H. to set aside the sale, in which it was shewn that F. Island was assessed by mistake as the improved island on the resident roll and O. Island on the non-resident roll as Island D. It was

Held, [affirming the judgment of

FERGUSON, J.,] that as to errors in non-resident land assessments, under the provisions of the Assessment Act, R. S. O. ch. 180, the County Treasurer is not bound by the roll, but can receive evidence and correct errors therein, and that in this case he could have done so as to the "incorrect description" and the "erroneous charge" based thereon, and as to the taxes having been paid, and "satisfactory proof" being made on these points, it would have been his duty to stay the sale, and if so it was the duty of the Court to interfere and undo the wrong. The Assessment Act recognizes the possibility of evidence being given to evade or neutralize entries upon the roll and official books. And the sale was set aside. *Hall v. Farquharson*, 598.

Lease—Covenant to pay taxes—Local improvement taxes.]

—See LANDLORD AND TENANT, 4.

ASSIGNMENT FOR CREDITORS.

1. *Guarantee—Creditors right to rank on two estates in hands of assignees — Valuing security — 48 Vic. ch. 26 (O.), sub-sec. 4 (b.).*]

The plaintiffs supplied B. with goods on the guarantee of M. M. made an assignment for the benefit of creditors under 48 Vic. ch. 26 (O.) B. assigned in like manner a few days after. The plaintiffs proved their claim for the full amount on M.'s estate, and stated that they held as security their claim against B.'s estate, but did not value it. B. effected a composition with his creditors, and gave composition notes therefor. The defendant M.'s assignee refused to pay a dividend to plaintiffs until they had valued their

security on B.'s estate. Upon a special case being stated for the opinion of the Court, it was

Held, that by B.'s assignment his estate was placed in *custodia legis*, protected from judgments and executions, and made available for the creditors who were thus potentially seized of their proper proportion of the assets. The original personal claim was thus transmuted into a claim *in rem*, and so could fairly be regarded as in the nature of a security, which the plaintiffs were bound to value under sub-sec. 4 (b). *Wyld v. Clarkson*, 589.

BANKS AND BANKING.

1. *Cheque*—"Payable at par" at a named bank—*Effect of words—Liability—Right to charge back on dishonour.*]—The plaintiffs were the holders for value of a cheque drawn by the Mahon Bank on the Bank of Montreal, at London, on the face of which appeared the words "payable at Bank of Montreal, Toronto, at par." The cheque was deposited by the plaintiffs to their own credit with their bank at T., and in the usual course of business was sent by that bank to the Bank of Montreal at T., and by the latter bank was credited to the former. It was then forwarded to L., where it was dishonoured, and in due course was charged back by the Bank of Montreal to the plaintiffs' bank, and again by the latter to the plaintiffs. It appeared that the above words were habitually used by the Mahon Bank on their cheques with the assent of the Bank of Montreal.

Held, that the whole effect of the words was, that the Bank of Montreal at T. would make no charge

for cashing the cheque, and that they did not assume the risk of their being funds to meet it, and that they did not lose the right to charge it back on ascertaining there were no funds. *Rose-Belford Printing Co. v. Bank of Montreal et al.*, 544.

Bill of exchange—Forgery of drawer's name—Estoppel—Forgery of payee's name—Action to recover back amount of forged bill—Laches.]—*See* **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 1.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Bill of exchange—Forgery of drawer's name—Estoppel—Forgery of payee's name—Action to recover back amount of forged bill—Laches.*]—The plaintiff made an arrangement in T. with Y., an employee of a certain company, to discount their draft on B. & Co., for \$4,989.65, at three months, and in pursuance of this arrangement a draft was drawn in H. by Y., in the company's name, on plaintiff, payable on demand to their own order, for \$4,800, dated 23rd July, 1883. This draft was taken by Y. to defendants' banking house at H. and there discounted by him, and the proceeds drawn by cheques in the name of the company. The draft was then forwarded by the defendants to their branch in T., and by them presented to plaintiff for acceptance and payment. Plaintiff then discounted the first mentioned draft with the defendants at T., and with the proceeds paid the draft for \$4,800. Plaintiff, about 11th September, 1883, discovered that both drafts had been forged by Y., and immediately notified defendants, at the same

time demanding payment of the amount of the forged draft for \$4,800, which was refused by defendants. Plaintiff paid the first mentioned draft at maturity :

Held, that although plaintiff, by acceptance and payment, was estopped from denying the signature of the company, as drawers, yet he was not estopped from denying their signature as endorsers, even though it was on the bill at the time of acceptance and payment.

Held, also, that defendants having no title to the bill, the endorsement being a forgery, were not entitled to receive payment, and having been paid plaintiff was entitled to recover back the amount so paid.

Held, also, that plaintiff had not lost his right of action by his delay in discovering the forgery, there being no actual genuine party on the bill to whom defendants could have recourse, and no remedy having been lost by them by such delay. *Ryan v. Bank of Montreal*, 39.

Agreement for acceleration of time for payment of promissory note.

See COVENANT, 3.

BILLS OF SALE AND CHATTEL MORTGAGE.

1. *Chattel mortgage—Proof of consideration—Onus of proof—New trial.*—In an interpleader action to try the right to the proceeds of the goods sold by the sheriff one of the plaintiffs was a mortgagee of the goods. He put in and proved the chattel mortgage, but gave no evidence of a debt due or pressure used. On this the Judge charged the jury that there was no evidence of a debt or of pressure, and he re-

fused to allow the consideration to be proved after the plaintiffs closed their case. The jury brought in a verdict for the defendant.

On a motion to enter a judgment for plaintiffs or for a new trial, it was held that there must be a new trial.

Per BOYD, C. — The mortgagee plaintiff proved enough to cast the burthen of attack on the defendant. Proof of the mortgage duly executed shewed that the property and title to the goods passed from the judgment debtor to the mortgagee before the seizure. The execution creditor should displace this ownership by showing want of consideration or other reason. Suspicion would not justify the conclusion that the mortgage was a voluntary instrument contrary to its purport. There was no evidence that the wife knew of the husband's insolvency, and concurred with him in an attempt to gain a preference at the expense of the other creditors.

Per PROUDFOOT, J. — The mortgage might be valid if given for a present advance of money for carrying on the business or other proper purpose, and insolvency would not be a circumstance shifting the onus of proof, and the production of the mortgage would be *prima facie* evidence; as the plaintiff, the mortgagee appeared to have been misled, and was refused leave to supplement his evidence; a new trial should be granted to him. *Furlong v. Reid*, 607.

BREACH OF PROMISE OF MARRIAGE.

Corroborative evidence—Statute of Limitations.—*See HUSBAND AND WIFE*, 1.

BY-LAW.

Municipal corporations — By-law against creating disturbance by beating drums, etc.—Conviction.—See CONVICTION, 1.

To establish road—Omitting to state—Invalidity.—See WAYS, 1.

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CANADA TEMPERANCE ACT
1878.

1. *Canada Temperance Act—Offence—Conviction—Habeas Corpus—Certiorari—Distress warrant—Commitment.*—A prisoner having been convicted of an offence under the Canada Temperance Act, an application for her release was made under a *habeas corpus*, and a writ of *certiorari* was also issued.

Held, that the writ of *certiorari* must be superseded, and following *Regina v. Wallace*, 4 O. R. 127, that such writ cannot issue merely for the purpose of examining and weighing the evidence taken before the magistrate.

Held, also, that it was not necessary to serve a minute of the conviction on the defendant, as sec. 52 of 32 & 33 Vic. ch. 31 (D.), only requires such service in case of an order, and that defendant must take notice of the conviction at her peril.

Held, also, that when a distress warrant has been issued and returned the truth of the return cannot be tried upon affidavits.

It was alleged, but denied, that the bailiff had refused to receive the penalty and costs.

Held, however, that his duty was to execute the warrant of commitment, and that he had no authority to receive such payment.

The warrant of commitment which

was not issued until after the return of the distress warrant, was dated the 14th June, and the distress warrant was not returned before the 17th June.

Held, that the warrant of commitment need not be dated at all if not issued too soon.

It was alleged, also, that too large a sum had been charged for costs, but,

Held, lastly, that the conviction being regular on its face, and not shewing any excess of jurisdiction, such an irregularity (even if it existed) could not be enquired into on the present application. The prisoner was therefore remanded. *Regina v. Saunderson*, 178.

2. *Day of adoption—Evidence of accused—Not bound to criminate himself.*—On an application to quash a conviction under the Temperance Act, 1878.

Held, that the adoption of the Act is on the day of polling.

Held, also, that under sec. 123 of the Act, by which the accused is made a competent and compellable witness, he is not bound to criminate himself. *Queen v. Halpin*; *Queen v. Daly*, 330.

3. *Canada Temperance Act, 1878, secs. 100, 107, 108, 117—32-33 Vic. ch. 31, secs. 57, 62 (D)—Search warrant, when issuable—Evidence under admissible although irregularly issued—Second offence—Imprisonment.*—The defendant was convicted before the Police Magistrate of the town of S., for unlawfully keeping for sale intoxicating liquor, &c., at the said town contrary to the Canada Temperance Act, 1878. The depositions were to that effect, and the evidence shewed that the liquor was found upon the pre-

mises of the defendant in the said town.

Held, that the local jurisdiction of the Police Magistrate sufficiently appeared.

Before any complaint or charge was made against the defendant a search warrant was issued and executed, and evidence obtained upon his premises, under which he was convicted.

Held, that a search warrant under the Act is a proceeding to sustain a charge made for an offence committed against the Act, and not a proceeding taken upon which to found a charge to be made in case liquor is found on the premises.

Held, however, that although the search warrant was illegally issued the evidence obtained under it was admissible against the defendant.

The conviction in the case was for a second offence and imposed imprisonment in default of payment of the fine and no distress.

Held, that secs. 57 and 62 of the Summary Convictions Act, which form a part of the Canada Temperance Act, authorized imprisonment not exceeding three months in default of sufficient distress.

Quære, whether for a third offence under the Canada Temperance Act a fine of \$100 cannot also be imposed in addition to imprisonment. *Regina v. Doyle*, 347.

4. *Presumption from the finding of appliances mentioned in sec. 119—Variance between conviction and minute of adjudication—Power of amendment—Certiorari—Power of Court to dispose of the case on the merits on return of, under secs. 117, 118.*—The defendant was charged with the offence of keeping liquor for sale contrary to the provisions of the second part of the Canada Temper-

ance Act. Evidence was given of the finding of certain of the appliances mentioned in sec. 119.

Held, that apart from the presumption created by that section upon the finding of such appliances, such finding was evidence of a keeping for sale, of the weight of which the magistrate was the proper judge.

The magistrate at the close of the case made a minute of adjudication, in which he stated that he found the defendant guilty and imposed a fine of fifty dollars and costs, to be paid by a date named, and awarded imprisonment for thirty days in default of payment. Afterwards, when drawing up the formal conviction, the magistrate adopted the form I₁, in the schedule to the Summary Convictions Act, directing that in default of payment by the day named, the penalty should be levied by distress and sale, and awarding imprisonment for thirty days in default of sufficient distress.

Held, (1) that the conviction in the form I₁, was the proper conviction to be made, under the combined provisions of sections 107 of the Canada Temperance Act, and sections 42 and 57 of the Summary Convictions Act, and not the Form I₂, to which form the minute of adjudication apparently pointed. (2) That the conviction was open to the objection that it did not correspond to the minute of the actual adjudication, and, therefore, could not be supported for want of jurisdiction in the magistrate to make it. (3) That under sections 117 and 118 Canada Temperance Act the Court, upon the motion to quash, might dispose of the case upon the merits upon the material returned with the certiorari, and that in this case the conviction, being warranted by the evidence, ought to be affirmed and the minute of adjudication

amended so as to conform to 'it.
Regina v. Brady, 358.

5. *Canada Temperance Act, 1878*, secs. 100, 115, 120, 121—*Disqualification of convicting magistrate*—*R. S. O. ch. 71, secs. 7, 22—Variance between information and conviction—"Disposal"—"Sale"—Amendment.*—The Court refused to quash a conviction under the Canada Temperance Act, 1878, on the ground that one of the convicting magistrates had not the necessary property qualification, the defendant not having negatived the magistrate's being a person within the terms of the exception or proviso of sec. 7 of ch. 71, R. S. O.

Held, also, that there was no variance between the information and conviction because the former used the expression "disposal," and the latter "sale," and that if there had been, an amendment of the information would have been made under secs. 116, 117, 118 of the Canada Temperance Act, 1878. *Regina v. Hodgins*, 367.

6. *Conviction—Want of jurisdiction on face—Amendment of return—Excess of jurisdiction.*—The fact that the Canada Temperance Act, 1878, (second part) is in force in any county, &c., must be proved like any other fact necessary to give jurisdiction.

Where, however, a conviction did not on its face shew that the Act was in force, the Court on the merits allowed the return to be amended so as to shew jurisdiction, and for this purpose allowed a further return of the "Gazette" produced as an exhibit, but not filed.

The Magistrate ordered the defendant to pay \$1 for the use of the hall for trying the case, and con-

demned the defendant, in default of distress, to imprisonment.

Held, that in ordering payment of this sum there was a clear excess of jurisdiction, and that ordering distress, &c., was a further excess, and that the matter was one of principle and not of form, and the conviction was quashed.

Regina v. Wallace, 4 O. R. 127, and *Regina v. Walsh*, 2 O. R. 206, commented on.—*Regina v. Elliot*, 524.

CASES.

Abrey v. Newman, 16 Beav. 431, referred to.—*See WILL*, 2.

Allan v. McTavish, 2 A. R. 278, followed.—*See MORTGAGE*, 2.

Barnes v. Bellamy, 44 U. C. R. 303, followed.—*See LANDLORD AND TENANT*, 4.

Baker v. Mills, 11 O. R. 253, followed.—*See MORTGAGE*, 1.

Centre Wellington Case, 44 U. C. R. 132, referred to and distinguished.—*See PARLIAMENTARY ELECTIONS*, 1.

Columbine v. Penhall, 1 Sm. & G. 228, referred to and followed.—*See FRAUDULENT CONVEYANCE*, 2.

Commercial Bank v. Cooke, 9 Gr. 524, referred to and followed.—*See FRAUDULENT CONVEYANCE*, 2.

DeGear v. Smith, 19 Gr. 570, followed.—*See CONTRACT*, 1.

Empire Gold Mining Co. v. Jones, 19 C. P. 245, followed.—*See COVENANT*, 2.

Fearnside v. Flint, 22 Ch. D. 579, not followed.—*See MORTGAGE*, 2.

Fraser v. Thompson, 1 Giff. 49, distinguished.—See FRAUDULENT CONVEYANCE, 2.

Frye v. Milligan, 10 O. R. 509, followed.—See SALE OF GOODS, 2.

Gardner v. Barber, 18 Jur. 508, considered.—See WILL, 1.

Hayne v. Maltby, 3 T. R. 438, distinguished.—See PATENT OF INVENTION, 1.

Hall v. Conder, 2 C. B. N. S. 22 commented on.—See PATENT OF INVENTION, 1.

Knapp v. Noyes, Amb. 662, considered and commented on.—See WILL, 1.

Lemay v. Chamberlain, 10 O. R. 638, followed.—See LIBEL, 1.

The Mayor, etc., Swansea v. Thomas, 10 Q. B. D. 48 followed.—See LANDLORD AND TENANT, 4.

McCall v. Theal, 20 Gr. 48, followed.—See TRADEMARK, 1.

McDonald v. Elliott, 12 O. R. 98, referred to and distinguished.—See MORTGAGE, 3.

McGregor v. McNeil, 32 C. P. 538, referred to.—See DEED, 3.

Nash v. The Worcester Improvement Commissioners, 1 Jur. N. S. 973, referred to.—See RAILWAYS AND RAILWAY COMPANIES, 3.

Northey v. Northey, 2 Atk. 77, followed.—See WILL, 5.

Ontario and Quebec R. W. Co., and George Taylor, Re Arbitration between, 6 O. R., at p. 348, followed.—See RAILWAYS AND RAILWAY COMPANIES, 4.

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Partlo v. Todd, 12 O. R. 171, followed.—See TRADE-MARK, 2.

Platt v. Attrill, 10 S. C. R. 425, referred to.—See COVENANT, 2.

Regina v. Beckwith, 8 C. P. 277, followed.—See EVIDENCE, 1.

Regina v. Malcolm, 2 O. R. 511, distinguished.—See WAYS, 2.

Regina v. Stubbs, 7 Cox C.C. 48, followed.—See EVIDENCE, 1.

Regina v. Wallace, 4 O. R. 127, followed.—See CANADA TEMPERANCE ACT, 1878, 1.

Regina v. Wallace, 4 O. R. 127, commented on.—See CANADA TEMPERANCE ACT, 1878, 6.

Regina v. Brady, 12 O. R. 358, followed.—See CERTIORARI, 1.

Regina v. Walsh, 2 O. R. 206, commented on.—See CANADA TEMPERANCE ACT, 1878, 6.

Saxton v. Dodge, 37 Barb. (N.Y.) 84, distinguished.—See PATENT OF INVENTION, 1.

Sinclair v. Great Eastern R. W. Co., L. R. 5 C. P. 391, followed.—See MORTGAGE, 3.

Smith v. Neale, 2 C. B. N. S. 67, commented on.—See PATENT OF INVENTION, 1.

St. John v. Rykert, 10 S. C. R. 278, followed.—See MORTGAGE, 3.

Sutton v. Sutton, 22 Ch. D. 511, not followed.—See MORTGAGE, 2.

Valin v. Langlois, 3 S. C. R. 1, followed.—See PARLIAMENTARY ELECTIONS, 1.

Wilkins v. Joddrell, 13 Ch. D. 564, considered and commented on.—See WILL, 1.

CERTIORARI.

1. *Conviction*—49 Vic. ch. 49 secs. 2, 3, 5, 7 (D)—*Retrospective operation of Statute—Excess of jurisdiction.*—Held, that though not expressly so enacted, 49 Vic. ch. 49, (D.), is retrospective in its operation, and applies to convictions whether made before or after the passing of the Act, and that under sec. 7 the right to certiorari is taken away upon service of notice of appeal to the Sessions, that being the first proceeding on an appeal from the conviction.

Held, also, following *Regina v. Brady*, (ante p. 358), that where imprisonment is directed on non-payment of a penalty, the award of distress of the goods to levy it, and then imprisonment in case the distress prove insufficient, is invalid in law, and an excess of jurisdiction.

Held, also, that the punishment being in excess of that which might have been lawfully imposed, the defect was not cured by secs. 2 and 3 of the above Act. *Regina v. Lynch*, 372.

2. *Livery stables*—*Municipal Institutions Act, 1883, sec. 510*—*By-law imposing license fee*—*Conviction for contravening*—*Certiorari*—*Recognition*—49 Vic. ch. 49, sec. 8 (D.)—“*Shall no longer apply*,” meaning of—“*Owner*.”—Held, that since the passing of the Dominion Statute 49 Vic. ch. 49, sec. 8, there is no longer necessity for a defendant on removal by certiorari of a conviction against him, to enter into the recognizance as to costs formerly required.

Held, also, that the words “shall no longer apply” in sec. 8 mean that from the day of the passing of the statute the Imperial Act shall no longer apply, not that the Imperial Act shall cease to have application in Canada upon a general order being passed under sec. 6 of the Dominion Act.

The Municipal Act, 1883, sec. 510, authorizes the licensing of owners of livery stables and of horses, &c., for hire.

A by-law passed under this section required every person owning or keeping a livery stable or letting out horses, &c., for hire to pay a license fee. Defendant was convicted under this by-law, for that “he did keep horses, &c., for hire,” without having paid the license fee.

Held, that the conviction was in conformity with both statute and by-law. *Regina v. Swallowell*, 391.

Power of Court to dispose of the case on the merits on return of certiorari under 41 Vic. ch. 16 (D.) secs. 117, 118.—See CANADA TEMPERANCE ACT, 4.

Cannot issue for purpose of examining and weighing evidence only.—See CANADA TEMPERANCE ACT, 1.

CHEQUE.

Expressed to be payable at a certain bank at par—*Subsequent dishonour*—*Rights thereupon.*—See BANKS, 1.

CONSTITUTIONAL LAW.

1. *Crown lands*—*Patent subject to condition*—*Trust*—*Crown's rights*—*Private Act*—*Provincial Legislature*—*Intra vires*—*Ordinance lands*—

“Sell, lease, or otherwise dispose of”—*Interpretation.*—Certain Ordinance land vested in the Crown was, in 1858, patented to the corporation of the city of T., with the following clause in the patent: “Provided always, and this grant is subject to the following conditions, viz., that (the land) * * shall be dedicated by the said corporation, and by them maintained for the purpose of a public park for the use, benefit, and recreation of the inhabitants of the said city of T., for all time to come” * * . The corporation of T., in 1876, obtained from the Ontario Legislature an Act empowering them “to lease, sell, or otherwise dispose of” the said land, and one of their committees transferred it to another to use as a cattle market, receiving a yearly rent therefor which they applied to a park fund as provided by the Act giving the power to sell, &c.

In an action by a ratepayer to prevent the land being used as a cattle market, and more money being spent on it for that purpose, in which it was contended that the land was granted upon a condition under which the Crown might retake it, and that the Act of the Provincial Legislature was *ultra vires* in dealing with it. It was

Held, on demurrer, that the words in the patent “Provided always and this grant is subject to the following conditions,” did not create a *condition* annexed to the estate granted, but a trust was created the same as if the words used had been “upon the following trusts,” and that by the grant the grantors parted with all their estate and interest: that the matter came within sub-sec. 13 of sec. 92 B. N. A. Act, “Property and Civil rights in the Province,” and the Provincial Legislature was the

proper one to legislate on the subject, and that the Act was not *ultra vires*.

Held, also, that the words “otherwise dispose of,” when read with the rest of the Act covered the mode of using the property adopted, viz., as a cattle market, and the demurrer was allowed, with costs.—*Kennedy et al. v. The Corporation of the City of Toronto et al.*, 211.

Jurisdiction of Provincial Courts to issue mandamus to a Dominion official—Inherent jurisdiction.—See PARLIAMENTARY ELECTIONS, 1.

CONTRACT.

1. *Contract—Specific performance—Uncertainty—Collateral security.*—The plaintiff, a bookkeeper and accountant, entered into the following agreement with the firm of R. & Co. in the form of a letter addressed to himself: “In consideration of you advancing us the sum of \$3,000, we agree to give you collateral security, and to pay you interest on the same at the rate of eight per cent. per annum.” The plaintiff advanced money for the benefit of the firm of R. & Co., but before he had received any security the firm made an assignment for the benefit of the creditors.

The plaintiff now sought to have it declared that he had a lien on the assets and effects of the firm, real and personal, and to have them assigned to him.

Held, that the agreement was incapable of specific performance by the court, for the reason that the terms were too vague and uncertain to be entertained. No kind of security was specified in the agreement, and parol evidence could not

be given to supply the deficiency. The plaintiff was, however, entitled to have judgment at law against the firm of R. & Co. for the \$1,900 and interest and costs of action.

DeGear v. Smith, 11 Grant, 570, followed. *Foster v. Russell*, 136.

2. *Written certificate—Final certificate as to completion of work, &c.*]

—The plaintiffs entered into a contract with the defendants to construct a cedar block roadway, &c., according to plans and specifications, and to the direction and satisfaction of the city engineer, &c. Payment was to be made monthly at the rates mentioned in the tender, during the progress of the work, upon the engineer's certificate and that of the chairman of the committee, and until the granting thereof no money was to become due and payable. A drawback of 15 per cent. was to be retained by the corporation until after six months from the time of the final certificate, shewing the satisfactory completion of the work. By the by-law no contractor could demand payment until he should present to the treasurer a certificate from the engineer, &c., stating he had examined, measured, and computed the work, and that the same was completed, or that the payment was due on such work, and also stating what the work was on which such money was due. It also provided that every account before being paid should be certified by the engineer, and by the committee under whose authority the work was done; and the treasurer should not pay such accounts unless furnished with the two certificates.

Held, that the required certificate must be in writing.

By the conditions found with the specifications the engineer was the

sole judge of the quantity and quality of the work done, and his decision was to be final and conclusive as against the contractor; and it was provided that monthly payments up to 85 per cent. of the work done should be made, &c., on the measurement of the engineer, such certificates to be binding only as progress certificates, and in no way to affect the final certificate, which should only be given on the whole work being completed and measured up, and at the expiration of six months when a certificate for the balance should be issued by the engineer. Part of the work required to be done by the plaintiffs was the raising and removing of the street railway ties, &c., and replacing same after the grading and ballasting had been completed. The plaintiffs did not replace the ties, &c., as the street railway company elected to do the work themselves, but the plaintiffs sent in their accounts charging therefor as if they had done the work. As to a portion of the work there was no certificate by the engineer that the work was done or that the price was payable therefor; and as to the other portion the acting engineer wrote under the account sent in "allowed one-third of above \$521.-66;" and then under this was written "certified for the sum of \$521.-66." On the back of the account the engineer subsequently certified that he had examined the account, and that the plaintiffs were entitled to recover the sum of \$521.66, which was paid to the plaintiffs. Under this certificate the plaintiffs claimed that they were entitled to recover for the whole work done, as this was the effect of the certificate.

Held, that as to the first-named portion there could be no recovery by reason of the absence of a certi-

ficate; and as to the other portion the certificate did not shew that the work was done to the engineer's satisfaction or was completed, or that the payment demanded was due; but at most that one-third of the work was done, which had been paid for; and therefore nothing was shewn to be due to the plaintiffs. *Ardagh v. The Corporation of the City of Toronto*, 236.

3. *Readiness and willingness to perform—Breach—Evidence.*]—In order to recover in an action for non-performance of a contract to do work, the plaintiff must shew a willingness and readiness on his part to perform, and on the defendant's part, a distinct and unequivocal absolute refusal, and that such refusal was treated and acted upon by the plaintiff; for, if after refusal, he continue to urge or demand compliance with the contract, he must be deemed as considering it as not at an end.

In this case the plaintiff set up a contract made with defendants, to cut and lay down on the defendants' limits a quantity of ties; that he was to ship his outfit to Port Arthur, where he was to receive instructions from defendants as to the means and way of forwarding same to the place where the work was to be performed. The plaintiff sent his outfit to Port Arthur, and claimed that defendants neglected and refused to give such instructions and refused to carry out the contract whereby the plaintiff was damnified.

Held, that the evidence disclosed that the plaintiff himself was not ready and willing to perform the contract; and further, if a refusal to perform by defendants was proved, that it was not treated and acted upon by plaintiff as such, but there-

after he continued to treat the contract as still subsisting.

Held, therefore, the action failed. *McLellan v. Winston*, 431.

CONVERSION.

Price of land taken by railway company—Death of land owner—Who entitled, trustee of real estate or executor.]—See RAILWAYS AND RAILWAY COMPANIES, 3.

CONVICTION.

1. *Criminal law—Conviction for beating drum on public street—Omission to state without just or lawful excuse—Unusual noise—Noise calculated to disturb—Creating a disturbance.*]—A conviction was, that the defendant did, on the 16th May, 1886, create a disturbance on the public streets of the village of L., by beating a drum, &c., contrary to a certain by-law of the village. The information was in like terms except that the act was laid as done on Sunday. The by-law was passed under 47 Vict, ch. 32, sec. 13 (O.), whereby power was given to pass by-laws (sub-sec. 12), "for regulating or preventing the ringing of bells, blowing of horns, shouting, and other unusual noises calculated to disturb the inhabitants. The by-law provided that "the firing of guns, blowing of horns, beating of drums, and other unusual or tumultuous noises in the public streets of L., on the Sabbath Day, are strictly prohibited." The only evidence was that given by a person who said he "saw" the defendant "playing the drum on the streets of L." on the day in question

Held, that the conviction was bad in not alleging that the beating of the drum was without any just or lawful excuse.

Semble, that it could not be inferred from the evidence that the drum made any unusual noise, as the witness did not say he heard any noise, but only that he saw the defendant beating a drum.

Semble, also, that the words used in the statute that the noise made must be "calculated to disturb the inhabitants," and in the conviction that the defendant "did create a disturbance by * * the beating a drum," were not equivalent terms.—*Regina v. Martin*, 800.

Excess of jurisdiction — Enforcement penalty by distress of goods and subsequent imprisonment.—See CERTIORARI, 1.

Variance between conviction and minute of adjudication.—See CANADA TEMPERANCE ACT, 1878, 4.

Variance between information and conviction—Disposal — Sale.—See CANADA TEMPERANCE ACT, 1878, 5.

Want of jurisdiction on face—Amendment of return — Excess of jurisdiction.—See CANADA TEMPERANCE ACT, 6.

No minute need be served on defendant.—See CANADA TEMPERANCE ACT, 1.

Fair and reasonable supposition of right—Jurisdiction of Justice—Review of decision on question of fact.—See WAYS, 2.

Regular on its face—What can² be enquired into on certiorari and habeas

corpus—Excessive costs.—See CANADA TEMPERANCE ACT, 1.

COPYRIGHT.

1. *Copyright—Notice of entry—38 Vict. c. 88, secs. 9, 17 (D.)—Variation from statutory form—Stating in book that it is copyright before copyright actually obtained.*—G., the writer of a book, printed the book which he intended to copyright with notice therein of copyright having been secured, although he had not at the time actually taken the steps to obtain copyright. He, however, did this merely in anticipation of applying for copyright, which he subsequently applied for and obtained. Furthermore, it appeared to be sanctioned by the practice at the office at Ottawa, and there was no publication of the book till after the statutory title of the author was complete.

Held, that this did not invalidate the patent, and *quere* whether it was an infringement of sec. 17 of the Act respecting copyrights, 38 Vic. ch. 88 (D.), so as to subject G. to any penalty.

On the title page of the book as published the plaintiff caused these words to be printed: "Entered according to Act of Parliament, in the year 1883, by J. A. Gemmill, in the office of the Minister of Agriculture, at Ottawa."

Held, that this was a sufficient compliance with sec. 9 of the said Act, although the form of words used was not exactly the same as there prescribed, inasmuch as the words "of Canada," omitted after the word "Parliament," were immaterial. General remarks on forms prescribed in various cases by Acts of Parliament. *Gemmell v. Garland*, 139.

CORPORATIONS.

1. *Foreign corporation—Deposit with Minister of Finance—Application for distribution—Constitutional law—31 Vic. ch. 48 (D.)—34 Vic. ch. 9 (D.)*—Canadian policy holders petitioned for distribution of the deposit made by the above company, a foreign corporation, with the Minister of Finance under 31 Vic. ch. 48 (D.) and 34 Vic. ch. 9 (D.), the company being insolvent.

Held, that they were entitled to the relief asked, notwithstanding that proceedings to wind up the company were pending before the English Courts.

The above Acts are not *ultra vires* of the Dominion Parliament.

For any balance of their claims not covered by the deposit, Canadian Policy holders would be entitled to rank upon the general assets of the company.

The definition of "Canadian policy" and "policies in Canada" in 34 Vic. ch. 9, sec. 1 (D.) is not to be interpreted to mean that the deposit is only for the security of policy holders whose policies were issued after the deposit was made and license to transact business in Canada obtained. *Re Briton Medical and General Life Association* (2), 441.

COVENANT.

1. *Landlord and tenant—Covenants not to assign or sub-let, and for quiet enjoyment, and to repair according to notice—Assigns named—Reasonable wear and tear, &c.—Implied covenant to use premises in tenant-like manner—Action of waste—R. S. O. ch. 107, sec. 9.*—On May 19th, 1870, E. made a lease of

certain household premises to P. for twenty-one years. On 30th June, 1871, P., with E.'s assent, assigned to J. B. On 10th April, 1877, E., who was merely a bare trustee for plaintiff assigned the reversion to her. On 29th December, 1882, J. B., without plaintiff's knowledge or assent, assigned to C. B., who thereafter was in possession of the property, receiving the rents from sub-tenants and paying the rents under the principal lease to the plaintiff. The plaintiff had also received the rents prior to E.'s assignment to her. The lease was under seal, and was in the ordinary printed form, and purported to be under the Short Form Act. The statutory covenants were prefaced by the words: "And the said lessee for himself, his heirs and executors, administrators, and assigns hereby covenants with the said lessor, his heirs and executors, administrators, and assigns in manner and form following, that is to say." Then followed the ordinary statutory covenants, except after the covenant "to repair" were the words "reasonable wear and tear and accidents by fire and tempest excepted," and after the covenant, "not to assign or sub-let without leave," the additional covenant "and not to carry on any business that shall be deemed a nuisance." The covenant not to assign was (except as to the additional words) in the language used in covenant 7, column 2 of the Short Form of Leases Act.

Held, that the covenant not to assign or sub-let, &c., did not include assignees, as they could not be held to be named; and the prefatory words to the covenant would have no contrary effect; and therefore J. B.'s assignment to C. B. was no breach thereof; and this was equally so as to sub-letting by using the

premises as a tenement house; and also from the fact of the user having been open and notorious both by P. and J. B. for some thirteen years a license to do so must be presumed.

Quære, whether such covenant ran with the land, the authorities on the point being conflicting; but the County Judge, to whom the case had been referred, having found that it did so run, a Judge sitting in single Court refused to interfere.

Held, that the covenant to repair ran with the land; that J. B.'s liability as assignee of the term ceased on his assignment to C. B.; and he would only be liable for the breaches, if any, which occurred prior thereto; and the covenant must be read as subject to the words, "reasonable wear and tear," &c.

Held, also, that there could be no liability on defendants as executors of J. B. for breach of implied covenant by themselves and J. B. to use the premises in a tenant-like manner, for there being a lease under seal with express covenants, no such implied covenant would arise.

Held, also, that an action of waste would lie notwithstanding the express covenant to repair; but there must be what would constitute waste, a mere breach of covenant, not amounting to waste, not being sufficient; but to maintain such action the plaintiff must have a vested interest in the reversion, at the time waste committed, so that her claim, if any must be for waste committed after she acquired the reversion and up to J. B.'s assignment; but there could be no liability here, for as to J. B. it appeared his assignment was made more than a year prior to his decease; and the R. S. O. ch. 107, sec. 9, only applied to breaches committed by testator within six months prior to his decease; and that it was not

necessary for the defendant to set this up as a defence, the onus being on plaintiff to shew she came within the statute: and as to the executors it appeared they had no interest in the term and had never intermeddled with the property.

Held, also, that there was no breach of the covenant by defendant to repair according to notice because the notice was given to J. B. after he had parted with his interest in the term.

Held, also, that as to many of the alleged breaches they were such as came within the terms "reasonable wear and tear;" while as to others the evidence failed to disclose the date when they occurred and therefore whether prior to the assignment to J. B. *Crawford v. Bugg*, 8.

(See 49 Vic. ch. 21 (O).)

2. *Covenant for quiet enjoyment* — *Covenant for title* — *Breach* — *Damages* — *Set-off of arbitration damages* — *Different causes of action* — *Mortgagees* — *Parties*.] — On February 3rd, 1873, the company granted to A. T. P. (through whom S. P. the original plaintiff in this action claimed) a mill site on the river Maitland with certain easements, one of which was the right to erect a dam across the river high enough to take up eight feet of the fall of the river, the location of the dam being defined by the deed, and covenanted that they had the right to convey and for quiet enjoyment. The company had previously granted (without reserving any of the easements granted to A. T. P.) an island in the river called "Island C," and two parcels of land, one on each bank, immediately opposite each other, and adjoining the property of the plaintiff, called respectively "The Great Meadow," and "Block

F," all three of which were above the land granted to A. T. P., and subsequently became the property of H. Y. A.

In an action by S. P. (who died after action brought, M. A. P. being made plaintiff by order of revivor,) against the company, it was alleged and proved that a dam could not be maintained across the river high enough to take up eight feet of the fall of the river without submerging a great part of, if not the whole of "Island C," and penning back water and ice on "The Great Meadow," and "Block F," and encroaching upon the rights of H. Y. A. as riparian proprietor of the said lands.

It was contended on the part of the defendants that the mortgagees of the property should be made parties.

Held, that O. J. A., sec. 17, subsec. 5, enables a mortgagor, entitled to the possession of land, as to which the mortgagee has given no notice of his intention to take possession, to sue to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, and that the objection for want parties ought not to prevail.

Held, also, that in an action on a covenant for quiet enjoyment, a plaintiff must shew an interruption or obstruction of the easement in order to entitle him to recover, and that S. P. not having attempted to enjoy his easement by building a dam in the place and manner specified, and not having been interrupted, he could not succeed on the covenant for quiet enjoyment.

Held, also, as to the covenant for title, that as the Supreme Court of Canada had decided in *Platt v. Attrill*, 10 S. C. R. 425, that the company had no right to grant the easement to A. T. P., that decision

was binding here, although the company was not parties to the suit; and that the covenant was broken as soon as it was made, and the plaintiff was entitled to such damages as accrued during the life of S. P.; and following *The Empire Gold Mining Co. v. Jones*, 19 C. P. 245, that the damages would be the difference in money between the value of the estate that had passed, and that which the deed purported to convey, and the company covenanted they had the right to convey.

It appeared that during S. P.'s ownership, the Government had constructed a breakwater at the mouth of the river, and that S. P. had been awarded damages "on account of the penning or damming up of the waters by the construction of the breakwater, and forcing them back on S. P.'s property," and on another account not material to this action.

Held, that as the sum awarded was a lump sum for both accounts together, and as the evidence on the arbitration shewed that the breakwater only affected S. P. to the extent of three feet of water, leaving him a fall of five feet, the value of which could only be ascertained by a reference, and as the subjects of the arbitration and the action on the covenant were not the same, the company were not entitled to set off the money recovered from the Government against their liability for damages of breach of contract.

Held, also, that the registration of the previous conveyances, even if that was notice, was no bar to a recovery on the covenant.

The plaintiff, therefore, was held entitled to damages for breach of the covenant for title, and a reference was directed. *Platt v. Grand Trunk R. W. Co.*, 119.

3. *Covenant not to dispose of business — Transfer by firm to covenantor—Proviso for acceleration of time for payment.*—Where there was a covenant by defendant that one-half of the surplus proceeds of goods, transferred by the plaintiff to the defendant after deduction of liabilities, should be paid to the plaintiff by the defendant by his promissory note at two years, with a proviso that should the defendant or the firm of T. & S., of which the defendant was a member, dispose of their business, or make an assignment for the benefit of creditors, the note should become due, and S. subsequently retired from the business and transferred to the defendant all his interest therein.

Held, that the transfer by S. to T. was not a breach of the covenant, and that the time of payment of the note was not thereby accelerated. *Masters v. Threlkeld*, 645.

Lease—Assignment of reversion by the lessor to his wife—Covenant running with the land—Set off.—See LANDLORD AND TENANT, 3.

Sale of land—Rent service—Rent seek—Apportionment.—See SALE OF LAND, 2.

By lessor to make improvements—Breach—Damages—Measure of.—See LANDLORD AND TENANT, 2.

Landlord and tenant—Covenant to pay for improvements—Covenant running with land.—See LANDLORD AND TENANT, 5.

CRIMINAL LAW.

Evidence, admissibility of—Accomplice—Corroborative evidence — At-

tempt to procure abortion—See EVIDENCE, 1.

CROWN LANDS.

Patent subject to condition—Crown's rights—Private Act—Provincial Legislature—Ordnance lands.—See CONSTITUTIONAL LAW, 1.

DAMAGES.

Set off of damages awarded to plaintiff in prior proceedings against other parties.—See COVENANT, 2.

Covenant in lease to make improvements—Measure of damages—Conditional reduction of damages if improvements made.—See LANDLORD AND TENANT, 2.

Breach of covenant for title—See COVENANT, 2.

DEED.

1. *Patent—Metes and bounds—Conveyance — Waters — Acreage—Medium filum aquæ.*—A patent from the Crown purported to grant the W. $\frac{1}{2}$ of a certain lot of land, through which flowed the F. river, issuing out of the C. Lake in the N. W. corner of the half lot, and running across the half lot in a diagonal direction. In the metes and bounds given in the patent occurred the following courses: "Then S. 73 degrees 15 minutes W. 24 chains, more or less, to C. Lake; thence southerly, along the water's edge, to the allowance for the road between the 9th and 10th concessions; thence S. 15 degrees 45 minutes E. 21 chains, more or less,

together with the waters thereon lying and being."

From the point thus indicated on the margin of the C. lake, which was about the place of issuance of the F. river from it, a shoal, a good part of which was exposed, extended across in a southerly direction to the road between the 9th and 10th concessions. It was contended that the said metes and bounds indicated that a course was to be taken from the said point on the margin of the C. lake along the E. bank of the river to the imaginary eastern boundary line of the half lot, then across the river, and up the other side to the said road, and that this interpretation coincided with the acreage mentioned in the patent, and that none of the land covered by the F. river passed to the grantee.

Held, however, that the plan and description of the lot, together with the other circumstances of the case, shewed that by the "water's edge" was meant the edge of the lake, *i. e.*, the shoal above mentioned, which was to be taken as the margin of the lake, and the course indicated was across the lake on the line of the said shoal, so that the bed of the river crossing the half lot passed to the grantee, notwithstanding that by this interpretation about fourteen acres above the quantity mentioned in the patent passed thereby.

There being a reasonably accurate particularization of the four boundaries, the quantity of acres must not be regarded as the controlling term of the description.

The fair presumption was that such a course was meant as would give the most direct points of connection between the termini thereof.

Where a river flowed diagonally through a certain lot of land, and the owner of the lot granted the part

thereof lying N. or E. of the said river to one party, and the part lying S. or W. of the said river to the other party: *Held*, that this would carry the ownership of the soil to the mid thread of the river to the respective parties, no evidence of intention inconsistent therewith appearing upon the instrument. *Re Trent Valley Canal and Lands expropriated at Fenelon Falls*, 153.

2. *Deed subject to condition of maintenance—Place of maintenance—Refusal of covenantee to leave premises conveyed—Broken condition—Forfeiture.*]—H. S. by deed dated November 4th, 1863, granted his farm and some chattels to his son T. S. in consideration of \$300, "subject to be defeated and rendered null and void upon the non-performance by the said party of the second part of the following condition, or any part thereof, viz., The said party of the second part covenants to feed, clothe, support and maintain the said party of the first part * * during the term of his natural life * * ." T. S. having fulfilled the condition during his lifetime, died on October 5th, 1865, leaving a widow and one child. The widow removed from the farm, but offered to take H. S. with her to her father's house, and have him provided for there, or to allow him to go to her brother's house in the same way, both of which offers were declined, and as no maintenance was provided for him by her at the farm he treated the condition as broken, and brought an action of ejectment, and recovered judgment, and conveyed the farm away by deed, and the defendant became the owner by subsequent conveyance. H. S. was subsequently supported, part of the time on the farm, by the defendant, and died in 1880.

In an action of ejectment by the infant daughter of T. S., claiming under the deed to her father against the defendant, it was

Held (affirming the judgment of ARMOUR, J., PROUDFOOT, J., dissenting), that the grantor was not bound to accept the offers made, and that the conditions of the deed were broken and the land forfeited.

Per ARMOUR, J., (at the trial.) The deed must be construed as being made upon condition and as being defeated and rendered void by the non-performance of the covenant. The effect of the covenant is, that H. S. was to be maintained wherever he might choose to live, but he was not bound to go to any place the covenantor or his representatives might require him to go, and he was justified in refusing to accept the offers made.

Per BOYD, C.—The parent who for value purchases the right to support from his son has, if the written instrument is silent on the point, the first and controlling choice as to the place of abode. If the father's wishes are reasonable, having regard to his age and station in life, the Court ought to respect them in preference to the counter propositions of those who are to supply the maintenance. There was here no caprice, no unwarrantable obstinacy in the father's resolve to cling to the homestead, such as should induce the court to disregard the general rule. The result is, that the conditions of the deed were broken and the land forfeited.

Per PROUDFOOT, J. — The life interest of H. S. was not reserved out of the land, it rested solely on the condition, with probably an equitable charge on the land. The condition is to maintain without specification of place: it imposes no

personal obligation on the grantee, it may be fulfilled by any one having an interest in the property, and may be performed wherever the grantee or his representative might reasonably offer.

Per FERGUSON, J.—It was a condition annexed to the estate granted, the proper effect of which was that if broken the title would go to the grantor or those claiming from him the reversion in the lands; the grantor was not bound to accept the offer that was made, and there was a breach of the condition, the effect of which was to revest the estate. *Millette v. Sabourin*, 248.

3. *Agreement for sale of timber—Construction of—Right to cut and remove logs after time limited—Grant subject to condition—Trespass.*—By deed dated 4th April, 1874, made between J. and S. & L., J. agreed to sell and S. & L. to purchase all the merchantable pine, suitable for the purposes, standing, lying, and being on certain described property, for a sum which was then named and paid, "Provided, however that the said timber and logs shall be cut and removed off said lot on or before the 4th of April, 1884,"

The defendant B (claiming through S. & L.) after the expiration of the time agreed upon, removed logs which J. had cut after said 4th day of April, 1884, and for this J. brought this action and recovered a verdict for \$125.

B. moved against the verdict, on the ground that under the deed, and the assignment to him, he was the absolute owner of the timber, subject merely to such claim as the vendor might have against the vendees for breach of the covenant to remove the pine within the time named.

Held, (O'CONNOR, J., dissenting,) that the agreement could not be construed as an absolute grant of the pine trees suitable for the business of the grantees, subject to a *covenant* by them to cut and remove the trees within 10 years; *but* that it was a grant of the pine subject to the *condition* that the timber and logs should be cut and removed off the property on or before the 4th day of April, 1884.

Held, also, that this condition applied as well to trees severed before as to those severed after the expiration of the term.

Held, per O'CONNOR, J., that the case was within the meaning of the as decided by the Court in the case of *McGregor v. McNeil*, 32 C. P. 538, and that the defendant was the absolute owner of the timber, with an affirmative license to cut and remove the same, which the vendor could not revoke, although the time within which the timber was to be removed had expired; though the vendor might have other remedies. *Johnston v. Shortreed et al.*, 633.

DESCENT.

1. *The Devolution of Estates Act, 1886—49 Vic. ch. 22 (O.)—Rights of widow of intestate—Release of dower—One-third absolutely.*]—R. died intestate entitled to real and personal property leaving a widow and children.

Held, that the widow having elected to take her interest under section 4 of "The Devolution of Estates Act, 1886," 49 Vic. ch. 22 (O) was entitled to one-third of the real estate absolutely. *Re Reddan*, 781.

DISTRESS.

Distress warrant—Truth of return—Duty of bailiff.]—See CANADA TEMPERANCE ACT, 1.

DIVISION COURT.

Gambling debt—Prohibition—Jurisdiction.—See PROHIBITION, 1.

DOWER.

See DESCENT.

ELECTRIC LIGHT COMPANY.

Interference with poles of telephone company.]—See MUNICIPAL CORPORATIONS, 3.

ESTOPPEL.

See INSURANCE, 2.—MORTGAGE, 1.

EVIDENCE.

1. *Criminal law—Evidence, admissibility of—Accomplice—Corroborative evidence.*]—The prisoner was indicted for unlawfully using an instrument on J. L., with intent to procure a miscarriage. J. L. was called for the prosecution to prove the charge, and in cross-examination denied that she had told H. A., H. R., and M. T., that before the prisoner had operated on her she had been operated on by Dr. B. for the purpose of procuring a miscarriage. H. A., H. R. and M. T. were called for the defence, and swore that J. L. had so told them. Dr. B. was then called by the Crown, and he swore that he had not operated on J. L.

Held, that the evidence of Dr. B. was properly admitted; but in any event the prisoner's case was not so affected by the evidence as to warrant a reversal of the conviction,

even if the evidence were not strictly admissible.

The question whether or not a Judge, in charging a jury, should or should not caution them that the evidence of an accomplice should be corroborated, is not a matter for a Court to review on a case reserved, for it is not a question of law but of practice, though a practice which should not be omitted.

Regina v. Stubbs, 7 Cox. C. C. 48, and *Regina v. Beckwith*, 8 C. P. 277, followed. *Regina v. Andrews*, 184.

2. *Exclusion of witnesses at trial—Witness remaining in Court—Rejection of his evidence—New trial.*—At the trial of an action the witnesses were ordered out of Court. Before the case was closed the defendant's counsel tendered a witness who had remained in Court, but the presiding Judge refused to allow him to be examined. On a motion for a new trial it was

Held, that there must be a new trial.

Per PROUDFOOT, J.—The practice is to receive such evidence, but with great care. *Black v. Besse*, 522.

Contract for providing for security to be given—Inadmissibility of parol evidence to shew what kind of security meant.—See CONTRACT, 1.

Seduction—Admission of defendant—Excessive damages.—See SEDUCTION, 1.

Corroborative—Breach of promise of marriage.—See HUSBAND AND WIFE, 1.

Obtained under search warrant admissible though warrant irregular.—See CANADA TEMPERANCE ACT, 1878, 3.

Tax sale—Patentee—Tax title—Onus of proof.—See ASSESSMENT AND TAXES, 2.

See also MEDICAL PRACTITIONER, 1, 2.

See SALE OF LAND, 1.

EXECUTORS AND ADMINISTRATORS.

Remission of Mortgage debt by testator—Right of Mortgagor to discharge before paying his other indebtedness to estate—Administration order.—See WILL, 5.

Mortgage by—Priority—Mortgage by specific devisees.—See MORTGAGE, 4.

FRAUDULENT CONVEYANCE.

1. *Setting aside fraudulent conveyance of personal property—Evidence of collusion or fraud—Judgment and execution creditor*—48 Vic. c. 26, ss. 2 and 3 (O.)—In an action by a creditor for an amount due on a mortgage, and to set aside a conveyance of personal property in which the Judge who tried the case found that the transaction complained of was not made with intent to defeat the claims of creditors, or to give a preference, and that no collusion or fraud was proved. It was

Held, that as none of the creditors were judgment and execution creditors, in the absence of fraud, the plaintiffs could not set aside the transaction under the statute of Elizabeth, and

That although under 48 Vic. c. 26, s. 2 (O.), it might possibly be that the transaction should be held to be void as against creditors as *having the effect* of defeating, delaying, or prejudicing creditors, yet as the sale was not a sham or a colour-

able one, but was a real transaction and *bona fide*, that the plaintiffs failed on that branch of the case.

Part of the purchase money of the goods was arranged by the substitution of a note of the defendants for the notes of the defendant J. P., which had been transferred to a banker, and which note was on the subsequent sale to the defendant F. paid by him.

Held, that the transaction was a *bona fide* payment under 48 Vic. c. 26, s. 3 (O.) *The Building and Loan Association v. Palmer et al.*, 1.

2. *Fraudulent conveyance—Chattel mortgage—Insolvency of mortgagor*—48 Vic. ch. 26, (O.)—*Antecedent debt—Antecedent promise to give security*—49 Vic. ch. 25, (O.)—*Conflict of laws.*]—A company incorporated in the State of Michigan, while in insolvent circumstances, had given a mortgage upon chattels in Ontario to defendant, a Michigan Creditor, to secure previous cash advances made to the company under verbal promises by two directors that security would be given. The effect of the mortgage was to delay and prejudice other creditors and give defendant a preference over them.

Held, that under 48 Vic. ch. 26, (O.), without regard at all to any question of *bona fides*, pressure, or knowledge of the company's financial position by its officers, or by defendant, the effect alone of the transaction avoided it.

Held, also, that this mortgage was not given in pursuance of any antecedent contract or promise of the company, but even if it were that it could not be upheld because it was not shewn to have been given in consideration of a money advance

made in the *bona fide* belief that such advance would enable the debtors to continue business and pay their debts in full.

Held, also, that, the property mortgaged being in Ontario, the transaction was governed by the laws of Ontario without regard to the laws of Michigan. *River Stave Company v. Sill*, 557.

3. *Marriage settlement—Consideration for—Voluntary act—Fraud on creditors.*]—In an action brought by T. K. & Co., on behalf of themselves and all other creditors of J. G. against J. G., his wife, and the trustee, to set aside a marriage settlement by which J. G., a day or two before his marriage had settled the greater portion of his property on his wife, in which it was shewn that he and his wife before the marriage were living on the most intimate terms short of the intimacy of husband and wife, and that she would have accepted a proposal of marriage without hesitation without any condition as to a marriage settlement, and that he was in insolvent circumstances, of which fact she must have been aware, and that the settlement was purely voluntary on his part, and that she knew nothing of it until she was asked to sign the deed.

Held, that the settlement was not the consideration, or part of the consideration of the marriage, and that it must be set aside as fraudulent and void against creditors: *Commercial Bank v. Cooke*, 9 Gr. 524 and *Columbine v. Penhall*, 1 Sm. & G. 228 referred to and followed; *Fraser v. Thompson*, 1 Gif. 49, distinguished. *Thompson et al. v. Gore et al.*, 651.

FRAUD AND MISREPRESENTATION.

Execution of deed of quit claim under the influence of suggestio falsi and suppressio veri.—See WILL, 3.

GAMING.

1. *Gambling debt—Prohibition—Cheque—Note of hand—Division Court Act, sec. 53, sub-sec. 3.*—A cheque given in settlement of losses at matching coppers is a note of hand given in consideration of a gambling debt within sec. 53, sub-sec. 3, R. S. O. ch. 47, and such a security is void under 9 Anne ch. 14, even in the hands of a *bona fide* holder for value. *In re Summerfeldt v. Worts*, 48.

HAWKERS AND PEDLARS.

1. *Hawkers and pedlars—Con. Mun. Act, 1883, sec. 495, sub-sec. 3, as amended by 48 Vic. ch. 40 (O.)—Conviction under County by-law—Exposing samples of cloth and soliciting orders for clothing—Meaning of term “dry goods” in amended Act.*

Held, that under 48 Vic. ch. 40, sec. 1 (O.), amending sub-sec. 3 of sec. 495 of Con. Mun. Act, 1883, it is no offence to expose samples of cloth and solicit orders for clothing to be afterwards manufactured from such cloth, and to be then delivered to the persons giving such orders.

Held, also, that the term “dry goods” in the amended Act does not include clothing ordered to be manufactured from cloths, samples of which are exposed with a view to solicit orders for such clothing. *Regina v. Bassett*, 51.

2. *Hawkers and pedlars—Con. Mun. Act, 1883, sec. 496, sub-sec. 8, as amended by 48 Vic. ch. 40 (O.)—Conviction under county by-law—Meaning of word “Agents” in amending Act.*—*Held*, that, under 48 Vic. ch. 40, sec. 1 (O.), amending sub-sec. 3 of sec. 495 of the Consol. Mun. Act, 1883, a member of a firm carrying and exposing samples, or making sales of tea, &c., is not within the restriction preventing “agents for persons not resident within the county” from so doing, and is not such an agent. *Regina v. Marshall*, 55.

HIRE—RECEIPT.

Sale of goods—Agreement for—Warranty—Action for breach of—Property passing—Written notice—Waiver.—See SALE OF GOODS, 1.

HUSBAND AND WIFE.

1. *Breach of promise of marriage—Corroborative evidence—Statute of Limitations.*—In an action for breach of promise of marriage, the plaintiff stated that the defendant promised to marry her in the fall of 1873, but when that time had arrived he excused his doing so, because he said he had not his house built, and he agreed not to marry until he had a suitable house. The plaintiff told him she was willing to live in a shanty, and he said he would not marry until he could keep plaintiff. The house was built in the summer of 1878. No definite promise was proved after the fall of 1873, but the plaintiff and defendant kept up friendly relations until 1884, when the defendant married another wo-

man, and this action was brought. The defendant denied the promise. In his examination before the trial, he admitted visiting the plaintiff and of talking to her of marriage, but he said it was not of their marriage, but that of other persons: that when he visited her she was alone, and that he kissed her. In corroboration of the plaintiff's evidence a witness stated that in the fall of 1882, he had a conversation with the defendant, who, referring to some girls who visited his house, said he was not going to marry those who wanted his house, but the girl who wanted him; and on witness saying he supposed this was the plaintiff, the defendant answered "yes." The witness stated that in the next spring, or the following one, he had a further conversation with defendant, when defendant said he was either going to rent or sell his house or get married, when witness said he supposed plaintiff and defendant would soon make a match, to which the defendant made no reply.

At the trial it was objected that there was no evidence to corroborate the plaintiff's evidence as to the alleged promise, and that the action was barred by the Statute of Limitations. The learned Judge overruled the objection, and left the case to the jury.

Held, that the action was not maintainable.

Per CAMERON, C. J.—There was evidence to go to the jury corroborative of the promise stated by plaintiff; but, *per* CAMERON, C. J., and ROSE, J., the action was barred by the Statute of Limitations, the latter expressing no opinion as to the corroborative evidence.

Per GALT, J., without dissenting as to Statute of Limitations, the plaintiff's evidence was not suffi-

ciently corroborated. *Costello v. Hunter*, 333.

Lease — Covenant running with land—Assignment of the reversion by the lessor to his wife—Set-off.]—*See* LANDLORD AND TENANT, 3.

Marriage settlement—Fraud on creditors.]—*See* FRAUDULENT CONVEYANCE, 2.

Widow's right to maintenance.]—*See* WILLS, 1.

INSOLVENCY.

*Creditors right to rank on two estates in hands of assignees—Valuing security—*48 Vict. ch. 26, (O.), sec. 4 b.]—*See* ASSIGNMENT FOR CREDITORS, 1.

INSURANCE.

1. *Fire insurance—Loss payable to M. as his interest may appear—Right to sue—Joinder—Fraudulent judicial sale—Transfer—Consent—*R. S. O. ch. 162—*Proofs of loss under statutory condition—Earth oil—Condition as to keeping—"Stored or kept," meaning of—Tug boat—Building.*]—G. insured a tug when navigating the rivers Sydenham, St. Clair, Detroit, Thames, and Lake St. Clair, loss, if any, payable to M., as his interest might appear. M. at the time of insurance and down to the happening of the loss was mortgagee. The tug was libelled in the American Admiralty Court, and to avoid the claim thereon G. used the proceedings therein upon a claim for wages to have a fraudulent sale thereof made to J. Afterwards G. procured a renewal of the policy

without disclosing the sale, of which however defendants were subsequently notified. G., with defendants assent, assigned the policy to M., but before that assent was put in writing the tug was burned in the Chenail Ecarti, one of the channels of the St. Clair. At the time of the fire crude petroleum and earth oil were kept on the tug for lubricating purposes. M. and J. delivered proof papers of claim which were objected to. G. did not deliver any.

At the trial leave was given to add G. and J. as co-plaintiffs, and judgment was directed to be entered for the plaintiffs to the full amount of the insurance.

Held, (1) that the action was properly constituted in the plaintiff's name alone, but that if not the joinder of G. and J. as co-plaintiffs was proper.

(2) That the sale, although not a sale by operation of law, and fraudulent, was a sale in fact, and was on being assented to by defendants binding on them.

(3) That the tug was at the time of the fire at one of the localities permitted by the policy.

(4) That the crude and earth oils, being kept for lubricating purposes, could not be said to be "stored or kept," and that clause *f* of the 10th statutory condition did not apply. [WILSON, C.J., dissenting.]

Per WILSON, C. J.—The proofs of loss were not sufficient, but the refusal of the defendants to recognize the plaintiff M. in anyway and their retention of the policy were an answer to the imperfect compliance with the condition requiring full particulars of the loss to be stated, but the defendants were not liable by reason of the crude and earth oils being kept on the tug.

Per ARMOUR, J.—The sale of the tug was by operation of law.

Per O'CONNOR, J.—A tug is not a building within the meaning of clause *f* of the 10th statutory condition. *Mitchell v. City of London Fire Insurance Co.*, 706.

2. *Subrogation — Action against wrongdoer—Estoppel by verdict and judgment—Res inter alios actæ.*]

There can be no such thing as subrogation to the right of a party whose claim is not wholly satisfied.

In a case of partial insurance where a third party is liable to make good the loss, the assured is not clothed with the full character of trustee *quoad* the insurance companies until he has recovered sufficient from the wrongdoers to fully satisfy all his loss as well as expenses incurred in such recovery. In other words, when the assured is put in as good a position by the recovery from the wrongdoer, as if the damage insured against had not happened, then for any surplus of money or other advantage recovered over and above that the insurer is entitled to be subrogated into the right to receive that money or advantage to the extent of the amount paid under the insurance policies.

The defendant having been paid \$50,000 insurance moneys under various policies effected by him upon certain lumber, which had been burnt by a spark from an engine of the C. C. R. W. Co., afterwards brought action against the railway company and recovered a verdict of \$100,000; the jury finding that that "was the actual value of the lumber destroyed." The insurance companies now brought this action against him, claiming that he was trustee for them for so much of the \$100,000 as represented the excess

of the total moneys received by him over the amount of his loss, contending that he was estopped by the verdict from asserting his loss to be greater than that amount. The defendant, however, contended that his actual loss had exceeded the whole \$150,000.

Held, that he was not concluded from so contending by the finding of the jury in his action against the railway company, and that the utmost right of the plaintiffs was to have the amount recovered as damages from the railway company brought into account together with the moneys previously paid by the plaintiffs for insurance in order to ascertain whether the defendant had been more than fully compensated for his total loss by fire and other loss and outlay connected with the litigation, and for these purposes the matter was referred to the Master. *National Fire Ins. Co. et al. v. McLaren*, 682.

Foreign corporation—Deposit with Minister of Finance—Application for distribution—Constitutional law—31 Vic. ch. 48 (D.)—34 Vic. ch. 9, (D.)—See CORPORATIONS, 1.

INTEREST.

On mortgage debt after expiry of time for payment.—See MORTGAGE, 2.

Mortgage—Rate of interest after maturity.—See MORTGAGE, 3.

Landowner's right to a compensation money—Railways—"Taking."—See RAILWAYS AND RAILWAY COMPANIES, 4.

JUDICATURE ACT.

See MUNICIPAL CORPORATIONS 2, COVENANT 1.

JURY.

Adverse charge to jury.—See MALICIOUS PROSECUTION, 1.

Party conversing with one of the jury panel.—See MEDICAL PRACTITIONER, 1.

LANDLORD AND TENANT.

1. *Lease for life—Statute of Limitations—Registry laws.*—Mrs. H., the owner of lot 13, built a house thereon, but which on a survey made by a surveyor, B., was found to have encroached on lot 12, owned by R., seven and a half inches, whereupon the following agreement was entered into: "It is hereby agreed between R. and Mrs. H. that the line as surveyed between the lots of the above parties on Cherry street by B. is correct; but that the said Mrs. H. be permitted to occupy her house during her life, and not be compelled to remove the same, notwithstanding a portion of it is on the land of said R.; but that after the death of the said Mrs. H., said R. may claim the whole of his said lot; and that in the meantime said R. shall occupy his said lot up to the said line in rear of the said house." The defendant had purchased from M. to whom Mrs. H. had sold some 12 years prior to the trial, which took place in the spring of 1886, M. at the same time being aware of the agreement, but of which defendant when he bought had no notice. The defendant moved a fence, which plain-

tiff had erected in rear of the house in accordance with B.'s survey, in a line with the house, and also veneered the house with brick so as to cause it to encroach one and a half inches further on plaintiff's lot. Mrs. H. died within ten years before action commenced, which was brought to recover that part of lot 12 encroached on by defendant.

Held, that the plaintiff was entitled to recover, for that the agreement must be construed as a demise to Mrs. H. for life of that portion of lot 12 covered by the house, and not merely a license to occupy the same, so that the right of entry of the plaintiff, who claimed under R., did not accrue until Mrs. H.'s death, and therefore the plaintiff having brought his action within ten years of Mrs. H.'s death, was not barred by the Statute of Limitations.

It was objected that the plaintiff must fail under the registry laws, because the grant to Mrs. H. it appeared had not been registered, and defendant bought in ignorance of plaintiff's right, but *Held*, that the registry laws did not affect the matter, for as defendant bought lot 13 and not 12. the instrument relating to lot 12 would not properly be registered on lot 13.

Held, also, that the agreement signed by Mrs. H. recognizing the line run by B. as the true boundary between the lots, relieved the plaintiff from doing more than shewing where that line ran, and imposed on defendant, who claimed by mesne conveyance from Mrs. H., the burden of shewing that such line was incorrect.

Per ROSE, J.—The plaintiff was clearly entitled to recover as to the one and a half inches; but as to the seven and a half inches, though in doubt, he concurred in the judgment

of the Court. *Roan v. Kronsbein*, 197.

2. *Breach of covenant by lessor—Damages—Measure of.*—In an action by the plaintiff, the lessee of a certain farm, against the defendant, the lessor, for breach of the covenants contained in the lease, to dig ditches, &c.

Held, CAMERON, C. J., dissenting, that the measure of damages was the difference between the rentable value of the demised premises with the defendant's covenant performed, that is, with the improvement made, and the value without such improvements.

At the trial the learned Judge directed that if certain improvements were made, the damages were to be reduced thereby. On its being shewn to the Divisional Court that those improvements had substantially been made, the damages were reduced to \$200. *McEwen v. Dillon*, 411.

3. *Husband and wife—Covenant running with land—Assignment of the reversion by the lessor to his wife—Set-off.*—*Held*, that a married woman, though married before May 4th, 1859, was not bound by a covenant of her husband, entered into by him for himself, his heirs and assigns, as lessor of certain lands, to pay at the expiration of the lease for a certain malthouse which the lessee was to have liberty to erect on the demised premises, though the reversion had been assigned to her husband and another as trustees for her, in such a way that she had the entire beneficial interest, and though the covenant ran with the land.

Held, also, that a claim on behalf of the said trustees for rent in arrear and for damages for non-repair was not matter of set-off against damages

recovered against the husband for breach of his covenant to purchase the malthouse, though he was one of the trustees, they not being matters arising in the same right. *Ambrose v. Fraser et al.*, 459.

4. *Lease—Covenant to pay rent and taxes—Conveyance away of part of the leased premises—Assignment by lessee—Action for part of the rent and taxes—Apportionment—Eviction—Local improvement taxes—Additions to taxes in arrears.*—J. B. leased certain lots A. B. C. D. E. & F. with other lands to the defendant. J. C. also at the same time leased lot G. to J. B., and other lands to defendant. J. C. then conveyed his reversion in lot G. to J. B. and J. B. conveyed away the other lands mentioned in his lease to S. A. H. Defendant assigned all his interest in both leases to J. S. McM., with the knowledge that J. S. McM. intended to endeavour to procure a conveyance of the fee for the purpose of laying out the land in building lots, which he failed to do and J. S. McM. assigned all his interest in lots A. B. C. D. E. F. and G. to C. Both J. S. McM. and J. C. paid rent to J. B., and after his death to his executrix the plaintiff. The rent of lots A. B. C. D. E. F. and G. fell in arrear, and the taxes also were left unpaid. Plaintiff then recovered judgment in an action of ejectment against C., and took possession of the lots.

In an action to recover the unpaid rent and taxes accrued on these lots before the recovery in ejectment, in which it was contended that as the action was brought against the original lessee who had assigned the lease, and was one on the covenant resting in privity of contract and not in privity of estate, there could

not be an apportionment of the rent as to these lots, it was

Held, following *The Mayor, &c., of Swansea v. Thomas*, 10 Q. B. D. 48, that the rent was apportionable, and the plaintiff was entitled to recover.

Held, also, that there was no eviction of the defendant by the lessor.

Held, also, on the evidence that although defendant might be a surety for the assignee, there was no release of the assignee, and consequently no discharge of the surety.

Held, also, following *Barnes v. Bellamy*, 44 U. C. R. 303, that the rent accrued from day to day, and was apportionable in respect of time accordingly.

Held, lastly, that under the wording of the covenant to pay "all taxes, rates, duties, and assessments whatsoever. * * * now charged or hereafter to be charged upon the said demised premises," the defendant was liable for local improvement taxes and for the additions made under the Assessment Act year by year to the amount of the taxes in arrear or additions made by the municipality. *Boulton et al v. Blake*, 532.

5. *Covenant to pay for improvements—Covenant running with land—Equitable lien.*—B. demised certain lands to W. by deed of lease, containing an agreement that, "at the expiration of the lease, the lessor, his heirs or assigns will pay the said lessee, &c., one-half of the then value of any permanent improvements he may place upon the said lands," &c.

Held, that the liability to pay for the said improvements ran with the land and attached as an equitable lien thereon as against the plaintiff, to whom B. had conveyed the said

land, such lien attaching on the title which B. had at the time of such conveyance to the plaintiff, and that on the expiration of the term, the latter could only recover possession of the said land subject to such lien.

Reference to the Master ordered to fix the value of such improvements. *Berrie et al. v. Woods*, 693.

Covenant not to assign or sublet and for quiet enjoyment, and to repair according to notice—Assigns named—Reasonable wear and tear, &c.—Implied covenant to use premises in tenant-like manner—Action of waste—R. S. O. ch. 107, sec. 9.]—See COVENANT, 1.

LEASE.

Lease for life—Statute of Limitations—Registry laws.]—See LANDLORD AND TENANT, 1.

Covenant not to assign or sublet—For quiet enjoyment—To repair according to notice—To use premises in tenant-like manner—Reasonable wear and tear—Action of waste.]—See COVENANT, 1,

Covenant to pay rent and taxes—Conveyance away of part of leased premises—Apportionment of rent—Local improvement taxes—Additions to taxes in arrear.—See LANDLORD AND TENANT, 4.

LIBEL.

1. *Mercantile agency—Privilege.]—In an action for libel it appeared that the defendants D. W. & Co., the proprietors of a mercantile agency, wrote to the defendant C., request-*

ing him to advise them confidentially of the plaintiff's standing and responsibility for credit, stating that plaintiff "claimed that his premises had been burglarized;" that he had lost from \$1,200 to \$1,600, asking if this were so, for full particulars, and whether there was not something wrong. The defendant C. replied: "I have made enquiry and find that the general opinion is, that he was not robbed at all, and what has been done he has done himself; at all events, if he was robbed, it is of not more than \$100 or \$200; circumstances are against him; still I cannot say." The defendants D. W. & Co., subsequently issued a printed circular or notification sheet, on which, after the plaintiff's name, were the words: "If interested, enquire at the office." This was published and circulated amongst the defendant's customers, some 800 in Canada and the United States, not more than three or four of whom had any interest in the plaintiff's affairs. The circular also contained the following: "The words 'if interested enquire at the office,' do not imply that the information we have is unfavourable. On the contrary, it may not unfrequently happen that our last report is of a favorable character; but subscribers are referred to our office because in justice to them, the parties reported, and to ourselves, the information can only be properly conveyed to those entitled to receive it by the full report, as we have it on our records." It was proved that the words: "If interested," &c., had the effect of injuring the plaintiff. No attempt was made by C. to prove that the statements made in his letter were true, or that he had made enquiry and found the general opinion to be as stated. The jury found for the plaintiff.

Held, that the words charged were clearly libellous, and there was no privilege; for as to D. W. & Co., the Court was governed by *Lemay v. Chamberlain*, 10 O. R. 638, it being proved that the notification sheet was sent to all subscribers whether interested in the plaintiff's affairs or not; and the explanatory statement did not affect the matter; and as to C. his failure to prove the truth of his statements, or his belief in their truth, deprived him of any privilege. *Todd v. Dun, Wiman & Co. and Chapman*, 791.

MAINTENANCE.

Duration of—Children—Widow.]
—See WILL, 1.

MALICIOUS PROSECUTION.

1. *Evidence—Taking legal advice, stating whole facts—Magistrate consulting County Attorney—Admissibility of evidence—Deposition.*]—In an action for malicious prosecution, it appeared that the plaintiff's father sold a buggy to B. for \$115, to be made in two payments of \$58 and \$57 respectively, and until paid the title and right of property were to remain in the vendor. Before the purchase money was paid B. sold the buggy to defendant, a livery stable keeper. The plaintiff's father, on hearing of this, directed the plaintiff to go and take it from defendant, which he did, informing those at defendant's place that plaintiff could be seen at an hotel named. The defendant, on his return, went and saw the plaintiff, who told him he was acting under instructions from his father, who claimed to be

the owner of the buggy, but, notwithstanding, the defendant caused the plaintiff to be arrested for larceny, and he was committed for trial, and was subsequently tried and acquitted. The jury found for the plaintiff.

Held, on the evidence, the verdict could not be interfered with.

The defendant set up that before causing the arrest he consulted a lawyer, but the jury found that the plaintiff did not give a full and true account of the case.

Held, that this ground failed.

Evidence was offered that the magistrate, against whom there was no charge, had, before acting, consulted the county attorney, which was rejected.

Held, that the rejection was proper.

An objection was taken to the charge, as being adverse.

Held, that the charge could not be complained of here, for to give effect to the objection would be to compel the Judge to submit the case to the Jury, leaving them to apply the evidence without any assistance from him, which was not the practice here.

At the close of the defence, the plaintiff's counsel, without objection, put in the defendant's examination before trial. The plaintiff's counsel, in addressing the jury, read a portion thereof; and the learned Judge, in his charge, read other portions.

Held, that there could be no objection to the learned Judge reading such other portions, as they were properly in evidence. *Scougall v. Stapleton*, 206.

MALPRACTICE.

See, MEDICAL PRACTITIONER 1, 2.

MANDAMUS.

Electoral Franchise Act—Mandamus to Revising Officer—Jurisdiction of Provincial Courts to issue mandamus to Dominion officer.—See PARLIAMENTARY ELECTIONS, 1.

Municipal corporations—Enforcing opening of original allowance for road.—See MUNICIPAL CORPORATIONS, 2.

MARRIAGE SETTLEMENT.

Set aside as fraud on creditors.—See FRAUDULENT CONVEYANCE, 2.

MASTER AND SERVANT.

Neglect of master—Injury of servant—Negligence.—See NEGLIGENCE, 1.

MASTER'S OFFICE.

Amount found due by Master not appealed against—Variation.—See MORTGAGE, 4.

MEDICAL PRACTITIONER.

1. *Malpractice—Evidence—Interference with jury—Rejection of evidence in rebuttal.*—Action against a medical man for malpractice. The alleged malpractice consisted in applying what was called the primary bandage to a fracture of the forearm; and, if this was good surgery, then there was neglect and want of proper care in applying the bandage too tightly, and in not placing the arm in proper position, whereby the arm be-

came paralyzed and permanently useless. The defendant admitted the use of the primary bandage, and justified its use as proper, and denied that there had been any neglect, &c. The jury found for the defendant.

Held, on the evidence that the verdict could not be interfered with.

A medical man called by the defendant stated, from the evidence given by the defendant, and the evidence given throughout the case, he could not say the defendant's treatment was bad surgery. The plaintiff proposed to call evidence in reply to shew from what defendant stated at the trial the treatment was bad surgery.

Held, inadmissible.

The defendant in conversation with one of the jury panel, but not one of the jury called to try the case, said he hoped the jury would give defendant the benefit of any doubt.

Held, not sufficient to justify the court in interfering with the verdict. *Van Mere v. Farewell*, 285.

2. *Malpractice—Evidence—Inconsistent finding of jury.*—In an action against a medical practitioner for malpractice the plaintiff must prove not only that there was negligence or want of skill on the part of the defendant, but also that the plaintiff was injured thereby.

In this case, which was for negligence and want of skill in the treatment of the plaintiff in her confinement, the jury found that the defendant was guilty of such negligence, in that he was remiss in giving instructions to the nurse, and in not seeing that his instructions were properly carried out.

Held, that the inconsistency in the finding would not entitle the defendants to judgment dismissing the action, but at most to a new trial if

there was evidence to go to the jury thereon.

Held, however, that there was no evidence from which it could reasonably be inferred that the injury complained of by the plaintiff was attributable to either want of skill or care, or negligence by defendant; and judgment was therefore directed to be entered dismissing the action. *McQuay v. Eastwood*, 402.

MORTGAGE.

1. *Mortgagor and mortgagee—Trespass—Estoppel by acquiescence.*—B., the owner of a mill, subject to a first mortgage for \$4,000, held by one K., gave a second mortgage to plaintiffs. Subsequently B., being desirous of having the mill converted from the "Stone" to the "Roller" system, applied to M., manager of the Ontario Loan and Savings Co., for an advance of \$7,300, to enable him to pay off the mortgages and leave a surplus to be applied in part payment of the cost of reconstruction, which advance the company agreed to make, and a mortgage for that amount was duly executed by B. in favour of the company.

B. thereupon entered into an agreement with defendants under which defendants were to reconstruct the mill for \$4,800, \$2,000 to be paid on completion of mill and balance in three equal annual payments, secured by a second mortgage on the property, and it was one of the terms of the said agreement that defendants should be furnished with a letter from M. agreeing to pay the \$2,000 on completion of mill. Defendants, without communicating with M., commenced work and did not ask him for such letter until after the work had progressed for

several weeks. When applied to for such letter, M. informed plaintiffs that he had not agreed with B. to give a letter for any specific sum, but only for whatever balance there might be left out of said sum of \$7,300, after paying off prior incumbrances, and that after allowing for the amount of such prior incumbrances there only remained about \$1,200, which latter amount he was willing to undertake to pay on the mill being completed. Defendants, in the course of reconstruction, had taken out most of the old machinery and put in new, and made considerable alterations, and upon M. declining to undertake to pay \$2,000, they removed the new machinery put in and left the mill in a dismantled condition. At the time defendants commenced work the amount due on plaintiff's mortgage was about \$1,700. The mill, whilst in such dismantled state, was sold under power of sale in K.'s mortgage and only realized enough to satisfy it, and plaintiffs, contending that defendants by their acts had diminished the value of their security, and that B., the mortgagor, was insolvent, brought this action to recover damages to the extent to which their security was impaired. It appeared in evidence that M., besides being manager for the loan company, was also plaintiff's manager, and that he was aware that B. had made a contract with defendants for remodelling the mill, although he did not know the precise terms of such contract, and that he saw the work in progress and raised no objection.

At the trial the learned Chief Justice dismissed the action, holding (following *Baker v. Mills*, 11 O. R. 253,) that plaintiffs, second mortgagees, not having the legal estate, and

not being in possession, or entitled to possession, could not maintain any action.

Held, per WILSON, C. J., and ARMOUR, J., that the plaintiffs must fail, not on the ground upon which the learned Chief Justice at the trial dismissed their action, but upon the ground that they had by their conduct and acquiescence precluded themselves from bringing it.

Per O'CONNOR, J., that plaintiffs must fail on both grounds. *The Western Bank of Canada v. Greey et al.*, 68.

2. *Mortgage—Action on covenant—Statute of Limitations—Rate of interest—Conflicting English and Canadian Authorities—R. S. O. c. 108, s. 23.]—Held,* that an action on a covenant in a mortgage for payment of the mortgage money, does not come within R. S. O. c. 108, s. 23 limiting suits for the purposes therein mentioned to ten years.

Allan v. McTavish, 2 A. R. 278, followed in preference to *Sutton v. Sutton*, 22 Ch. D. 511, and *Fearnside v. Flint*, *ib.* 579.

The covenant provided for payment of interest at nine per cent. up to the end of a year from the date of the mortgage.

Held, that, there being no evidence why such a rate of interest was provided for, and it being matter of common knowledge that nine per cent. was not considered excessive for advances in 1866, when the mortgage was made, and some following years, the same rate of interest should be allowed for the years subsequent to the expiry of the first year. *McDonald v. Elliott*, 98.

3. *Rate of interest—Payment into Court—Court rate of interest—Rate of interest after maturity of mortgage*

*—Contract or damages.]—A mortgage contained the following proviso for repayment: “\$3,000, with interest at eight per cent. per annum, the principal sum to be paid as follows” (in sums of \$1,000 yearly) * * “with interest at the rate aforesaid on the whole unpaid principal payable half yearly * * until payment in full, to be computed from the 1st day of June, instant, with interest at the same rate on all overdue payments of interest.”*

During certain proceedings on the mortgage in which the mortgagor disputed his liability to pay the balance due on the mortgage, the money was paid into Court where it remained for some six years, when it was paid out to the mortgagee who had succeeded in establishing his right to it. The Master in taking the accounts between the parties allowed no interest on the money paid in, the mortgagee having received the Court rate, and he allowed interest on the mortgage after its maturity at the rate therein provided up to the time appointed by the Court for payment, and certified that he allowed it as a matter of contract and not as damages. On appeal and cross-appeal from both of those findings, it was

Held, following *Sinclair v. The Great Eastern R. W. Co.*, L. R. 5 C. P. 391, that the mortgagor should pay interest on the sum paid into Court beyond the Court rate, and following *St. John v. Rykert*, 10 S. C. R. 278, that eight per cent. (the rate provided for) was not payable after the maturity of the mortgage from which time the legal rate only was recoverable. *McDonald v. Elliott*, 12 O. R. 98, referred to and distinguished. *Powell v. Peck et al.*, 492.

4. *Mortgage by executors—Mortgage by specific devisees—Priority—Amount found due by Master not appealed against—Variation.*—The judgment of Proudfoot, J., reported 11 O. R. 611 upheld in part.

By the Court—There should be no alteration in the amount found due by the Master when such amount has not been appealed against. *Gordon v. Gordon*, 593.

5. *Action to recover land—1st and 2nd mortgagee—Lease by mortgagor after mortgage—Mortgage in possession.*—C., owner of the premises in question, mortgaged them on 6th February, 1880, to the C. P. L. & S. Co. On 17th March, 1883, C. made a second mortgage to L. who assigned to plaintiff. On the 5th October, 1883, C. leased the premises to defendant for ten years from 1st April, 1884, at \$175 for the first year, and \$165 for subsequent years, payable in advance on 27th October in each year. The lease contained a clause that rent should be paid to H., or sent to the mortgagees "as payments of interest on loan made by the lessor." H. was the local agent of the first mortgagees. The clause referred to was inserted in the lease at the defendant's request. The rent payable on 27th October, 1883, 1884, and 1885, was paid by defendant to H., who remitted the money to the company. H. gave defendant receipts for the rent as agent for C. The company sent H. receipts for the money forwarded by him, expressing that the money was received on account of advances made to C. H. had no authority to receive money for the company. The company were not made aware of the existence of the lease, or of its provisions.

The plaintiff brought this action to recover possession of the mortgaged premises, his mortgage being in default. The defendant set up the lease and the clause referred to, the payment of rent to the company, and that he was tenant to the company, whose mortgage was in default.

Held, [reversing the decision of *Boyd, C.*,] that, as the company received the money sent them by H. not as rent of the mortgaged lands, but on account of advances made to C., they could not under the evidence be held to be mortgagees in possession, and that defendant was not their tenant.

Held, also, that even if the company had been aware of the provision in the lease and had received the money with such knowledge, they would not have been mortgagees in possession with defendant as their tenant, as the money under the very terms of the provision would not have been received as rent, but "as payments of interest on a loan made by the lessor." The plaintiff was therefore held entitled to recover. *Frost v. Hines*, 669.

Mortgagees as parties to action by mortgagor—O. J. A. 1881, sec. 17, sub-sec. 5.—See COVENANT, 2.

Mortgage by sureties—Release of mortgagors by laches of mortgagees—Banks—Forgeries.—See PRINCIPAL AND SURETY, 1.

Leaving mortgage with solicitor—Authority of solicitor to receive money.—See SOLICITOR AND CLIENT, 1.

MUNICIPAL CORPORATIONS.

1. *Necessarily raising sidewalk—Premises injuriously affected thereby*

—*Arbitration—Compensation—Action.*—The corporation of the city of Toronto, in the exercise of its corporate powers, necessarily raised the sidewalk in front of the plaintiff's premises whereby, as was alleged, the plaintiff's premises were injuriously affected, he having had to raise his premises to the level of the sidewalk. In an action to recover the expense occasioned thereby.

Held, on demurrer, that this was not the subject of an action, but for compensation under the arbitration clauses of the Municipal Act, 1883. *Adams v. The Corporation of the City of Toronto*, 243.

2. *Original allowance for road—Physical obstacles—Duty to open—Mandamus—Discretion—Consolidated Municipal Act, 1883, secs. 524, 526, 531, 544, 546, 550, 566.*—In an action against a township charging, (1st) the stopping up of a highway, thereby preventing access to plaintiff's farm; (2nd) the obstructing of a highway, thereby, &c.; (3rd) the not maintaining and repairing a highway, thereby, &c., it appeared that the part of the highway in question was part of the original allowance for road which had never been opened or made fit for travel, and physical obstacles prevented its being made fit for use except at a very large expense. It also appeared that the defendants had procured another site for a road, by which the plaintiff had access to and from his property, although not so convenient to him as the road in question if opened up would be; the defendants, however, had, in endeavouring to procure for the plaintiff a more suitable road to the east, been prevented by him from doing so; a road to the west they still offered to him.

Held, per WILSON, C. J., that the defendants were not liable under the circumstances for not maintaining and repairing the road.

2. That an action claiming a mandamus will lie against a municipality for not opening an original allowance for road, by reason of which the occupant of land cannot have access to and from his land, to and from a public road, if there be no other convenient way to and from his land, and if there be no good reason, in respect of means or otherwise, why such allowance should not be opened, and if the work required to be done for that purpose be worth the outlay required to open and maintain the same.

3. That although the municipality must be allowed a very large discretionary power to do or not to do such a work, it has not the sole and uncontrolled right to avoid doing it.

4. That if the claim made had been proved as stated, a new trial would have been granted, for the facts found by the jury were not warranted by the evidence.

Semble, if the evidence given will not warrant the Court in granting a mandamus upon motion to the Court, and the Court has before it all the materials necessary for finally determining the question in dispute, judgment may be given for the defendants under rule 321 of the Judicature Act.

Per ARMOUR, J.—That the *locus in quo*, though a highway in law, was not one in fact, and that the action would not lie.

Per O'CONNOR, J., that the actio was sustainable in law, and the verdict was supported by the evidence. *Hislop v. Township of McGillivray*, 749.

3. *License from municipal corporation—Telephone and Electric Light Companies—Interference by second licensee with rights of first—R. S. O. ch. 157, secs. 59, 70; 45 Vict. ch. 19, sec. 3, (O.)*—An interlocutory injunction having been granted to restrain defendants, who were carrying on business in partnership as an Electric Light Company under license from a municipal corporation, from running their lines in such a way as to interfere with the safe and efficient working of the business of the plaintiffs, an incorporated Telephone Company, also licensees of the corporation, under authority granted two years previously to the defendants' license,

Held, that, although the circumstance that the plaintiffs were in possession of the ground, and had their poles erected about two years before the defendants put up their poles, did not give them the exclusive possession or right to use the sides of the road on which they had placed their poles, yet, their possession being earlier than that of the defendants, the defendants had not the right to do any act interfering with or to the injury of the plaintiffs' rights.

Held, also, that independently of the provisions of R. S. O. ch. 157, secs. 59 and 70, as extended to Electric Light Companies, 45 Vic. ch. 19, sec. 3, (O.), the plaintiffs were entitled to relief on the general ground upon which protection and relief in cases of this kind are granted.

Quære, whether defendants were liable to indictment. *Belleville Electric Light Co. v. Belleville Electric Light Co.*, 571.

By-law to establish road—Boundaries—Omitting to state—Invalidity.]—See WAYS, 1.

Livery stables—By-law enforcing license fee—Conviction.]—See CERTIORARI, 2.

By-law against beating drums, etc.—Conviction—Just or lawful excuse.]—See CONVICTION, 1.

NEGLIGENCE.

1. *Negligence—Master and servant—Liability of defendant—Neglect of master.*]—Plaintiff sued as administratrix of her husband, who was killed by an explosion of defendants' powder mills at C., in Ontario, the head office of defendants being at M. in Quebec. The works at C. were carried on through a superintendent, who hired, paid, and discharged the workmen, saw that the works were kept in repair, and generally managed and controlled the business, subject to instructions from the head office and to the directions of one W., a director of the company who lived at H., in Ontario, and occasionally visited the works. Some time before the explosion and while the works were idle, W. visited them. At that time the shaker, a machine used in the manufacture of powder in one of the buildings, was out of repair. This W. directed C. the superintendent, and D. a carpenter, employed on the premises, to have repaired before commencing operations, which however, was not done, either through neglect on the superintendent's part, or in consequence of the company's having sent orders to be filled before it could be attended to.

Held, that though the superintendent's neglect was the neglect of a fellow workman, yet that W., a director, having given express directions to have the repairs made, C.'s neglect to repair the shaker was the neglect of the company, who were therefore liable.—*Matthews v. Hamilton Powder Co.*, 58.

Contributory—Overhead bridge—Accident — Railways. — See RAILWAYS, 2.

Railway company—Shipment of goods to a point beyond defendant's line.—See RAILWAYS, 1.

Railway company—Farm crossing—Duty to provide and maintain gate fastening.—See RAILWAYS, 4.

ORDNANCE LANDS.

Crown lands—Patent subject to condition—Provincial legislature.—See CONSTITUTIONAL LAW, 1.

PARLIAMENTARY ELECTIONS.

1. *Electoral Franchise Act—Revising officer—Mandamus—Notice to voter—Notice to revising officer—Jurisdiction of Provincial Courts to issue mandamus.*—A Revising Officer under the *Electoral Franchise Act*, 48-49 Vic. ch. 40 (D.) having declined to entertain the application of S. to have the name of D. struck off the voter's list on the ground that the notice to D. provided for by sec. 26 of the Act was not proved, and that the notice to the Revising Officer provided for by same section was not duly served on or given to him in time; on an application for a mandamus to the Revising Officer,

although it appeared no copy of the notice to D. was kept, and no notice to produce the original was served, it was shewn by two witnesses that a notice to D. filled up on a printed form with his name, address, and the objection to his vote had been mailed to him by a prepaid registered letter on June 26th, for the sittings of the Revising Officer on July 12th, following, and the certificate of registration was produced, although the witnesses had no distinct individual knowledge of the particular notice to D., and that such evidence had been given before the Revising Officer.

Held, that in the absence of evidence to the contrary such proof was sufficient.

The notice to the Revising Officer was left with his clerk at his office during the absence from town of the Revising Officer on Monday, June 28th, and on his return on the afternoon of that day he was told what had been done, and that if he did not consider that sufficient the notice would be procured again and served on him personally, but he said what was done was sufficient.

Held, that the last day for service for the sittings for the final revision to be held July 12th was Sunday, June 27th, but that under sec. 2, sub-sec. 2, of the Act, the time was extended, and S. had all the next day, and that the notice was well given on Monday.

Held, also, that the service of the notice on the clerk of the Revising Officer was, under secs. 19 and 26, a sufficient "depositing with" the Revising Officer to satisfy the statute, and the conduct of the Revising Officer amounted to an adoption of the action of the clerk, and was equivalent to personal service if such were required by the statute.

It was contended that the Revising Officer was an appointee of the Dominion Government, and that his sittings were sittings of a Court of Record, and that there was no jurisdiction in a Provincial Court to issue a mandamus to him.

Held, that the Dominion Parliament had, by the Electoral Franchise Act, interfered with civil rights in this Province, and had made no provision for a Court to superintend the conduct of the officials, and following *Valin v. Langlois*, 3 S. C. R. 1, that until such a Court is created the Provincial Courts by virtue of their inherent jurisdiction have a right to superintend the discharge of their duties by any inferior officer or tribunal.

Held, also, that the Revising Officer erred in point of law in assuming that the notice to him required personal service, and that it was too late, and in holding that notice to produce the notice to D. should have been given, which were not findings of fact, and such mistakes or errors are not such decisions as prevent the granting of the writ of mandamus. If he had found as a matter of fact that notice was not given to D., there might have been some difficulty in interfering with his conclusion. The *Centre Wellington Case*, 44 U. C. R. 132, referred to and distinguished. *Re Simmons and Dalton*, 505.

PARTIES.

Mortgagees as parties to action by Mortgagees—*O. J. A.*, 1881, s. 17, sub-s. 5.]—See COVENANT, 2.

PATENT OF INVENTION.

1. *Patent*—Assignment of territory—Defence of others manufactur-

ing—*Absence of fraud*—*Estoppel*.]

—The plaintiffs being the patentees of a certain article, by memorandum in writing, under seal, reciting that they were the inventors of the article in question, assigned all their interest in the patent to the defendant for a certain district or territory in consideration of certain royalties and sums of money therein agreed to be paid by him.

In an action to recover the consideration in which the evidence of the defendant went to shew that he knew before the first year after the making of the contract had expired that others were manufacturing the same article, but he did not complain or repudiate the transaction, or refuse to pay, or offer to resign, or require the alleged infringers to desist, or call upon the patentees to vindicate their patent, and that he had a profitable user of the invention to a substantial extent.

Held, that in the absence of fraud or warranty, or representation which induced the bargain and was falsified in the result, such a contract was simply for the purchase of an interest in an existing patent. No assumption arises, and no implication is to be made that the patent is indefeasible.

The plaintiffs were therefore held entitled to judgment.

Smith v. Neale, 1 C. B. N. S. 67, and *Hall v. Conder*, 2 C. B. N. S. 22, commented on; *Hayne v. Maltby*, 3 T. R. 438, and *Saxton v. Dodge*, 37 Barb. (N. Y.) 84, distinguished. *Vermilyea v. Canniff*, 164.

PRACTICE.

Certiorari—Conviction—49 Vic. c. 49 — Retrospective operation of statute.]—See CERTIORARI, 1.

Evidence—Exclusion of witness at trial—Witness remaining in court—Rejection of his evidence—New trial.]
—See EVIDENCE, 2.

Charge to jury—Adverse charge—Reading examination of party before trial.]
—See MALICIOUS PROSECUTION, 1.

Action to recover goods—Making one who had notified plaintiff not to remove the goods a party defendant.]
—See SALE OF GOODS, 1.

Warrant of commitment — Need not be dated if not issued too soon.]
—See CANADA TEMPERANCE ACT, 1.

Conviction—No minute need be served on defendant.—See CANADA TEMPERANCE ACT, 1.

Certiorari—Not to issue for purpose of weighing evidence merely.]
See CANADA TEMPERANCE ACT, 1.

Conviction—Regular on its face—What can be enquired into on certiorari and habeas corpus — Excessive costs.]
—See CANADA TEMPERANCE ACT, 1878, 1.

Search warrant—Canada Temperance Act—Issued before complaint made—Evidence.—See CANADA TEMPERANCE ACT, 1878, 3.

Distress warrant—Truth of returnⁿ—Duty of bailiff.]
—See CANADA TEMPERANCE ACT, 1.

Master — Amount found due—Appeal.]
—See MORTGAGE, 4.

PRINCIPAL AND SURETY.

1. *Mortgage—Security for indebtedness—Sureties—Change of original securities—Forgery—Release of sure-*

ties.]
—K. & Co. were customers of the plaintiffs and gradually accumulated a liability of about \$26,000, to secure which the defendants gave a mortgage containing a recital that the plaintiffs had agreed to make further advances to K. & Co. on receiving security for the then present indebtedness, and a redemption clause providing for payment of all bills, notes, and paper, upon which K. & Co. were then liable, together with all substitutions and alterations thereof and all indebtedness in respect thereof, the same being a continuing security. The bank did business with K. & Co. in two different ways, one by discounting K. & Co.'s customers notes, in which case their rule was to notify the customers that they held their notes, and another by discounting K. & Co.'s own notes and taking their customers' notes as collateral, in which case they always got the collateral notes to an amount exceeding the advance, but did not notify the customers.

At the time the mortgage was given all the notes held by the bank were believed to be genuine, and the discount of the customers' paper very largely exceeded the discount of K. & Co.'s notes. K. & Co. suspended two years later. At the time of the suspension it was discovered that by renewals and substitutions nearly all the notes at the date of the mortgage had been replaced by K. & Co., in renewals and substitutions by forgeries, and that the amount of the discounts of K. & Co.'s notes secured by the collaterals very largely exceeded the discounts of the customers' notes. In an action by the bank to foreclose the mortgage, the mortgagors claimed that they, as sureties, were discharged by the bank's action.

Held, that the bank parted with genuine and received fabricated securities, and through its laches or default necessarily worked prejudice upon the rights of the sureties; that of two innocent parties of whom one must suffer on account of the fraud or crime of a third, the one most to blame by enabling the wrong to be committed should bear the loss, and the defendants were exonerated from liability in so far as they were prejudiced by the conduct of the bank.

Primâ facie the bank were liable to the extent of the face value of the securities surrendered, but they were at liberty to reduce such amount by evidence as they might be advised. *The Merchants Bank of Canada v. McKay et al.*, 498.

PROHIBITION.

1. Upon proceedings being taken in the Division Court, in an action in which that Court has not jurisdiction, the defendant is entitled to prohibition immediately upon the action being brought, and the fact of no notice of statutory defence being given under sec. 92 R. S. O. ch. 47, does not affect the defendant's right to prohibition. *In re Summerfeldt v. Worts*, 48.

RAILWAYS AND RAILWAY COMPANIES.

1. *Railway Company — Common carriers — Shipment of goods to a point beyond defendant's line — Negligence — Release of co-defendants.* — The goods in question were shipped by the G. T. R., by plaintiff's agent in T., to plaintiff at M., Man. After much delay some of the goods were delivered in a damaged condition by

the C. P. R., whose line touches at M., and some were never delivered at all. Plaintiff brought his action for \$2,000 damages against the G. T. R., and subsequently the C. P. R. were made party defendants.

The statement of claim charged the G. T. R. on the contract, and the C. P. R. in tort. The G. T. R. set up a special contract, providing, amongst other things, for exemption from liability in case the goods were delayed, lost, or damaged beyond their line, which ended at Fort G. Before trial plaintiff settled with the C. P. R. for \$650, and executed a release to them, reserving his right to proceed against the G. T. R. for the balance, and notified the solicitor for the G. T. R. The plaintiff's agent stated that the contract was a purely verbal one, and that he paid the freight through to M., and received a receipt which he did not read, but forwarded it to plaintiff. Defendants gave evidence that their contracts of shipment were always contained in a bill of lading, signed by the shipper and retained by the company, and in a corresponding shipping receipt, signed by the company and handed to the shipper. The goods in question were carried in a sealed car from T. to Fort G., and the car was still sealed when delivered to the next carriers *en route*. The learned Judge thought there was no evidence of negligence so far as the line of the G. T. R. extended; but it was not disputed that the goods had been damaged and lost by negligence before they reached the plaintiff.

The jury found that the contract was verbal. In answers to questions put by the Court, the foreman stated that the bill of lading was signed by one of the defendant's clerks, and that a receipt, with the

usual conditions endorsed, was handed to plaintiff's agent at the time of shipment.

Held, that the contract, whether verbal or on one of the company's printed forms, was a through contract from T. to M., and that all corporations and persons employed *en route* were servants of the G. T. R. within the meaning of the Consolidated Railway Act, 1879, sec. 25, sub-sec. 4, and the loss having been admittedly occasioned by negligence, the defendants could not be relieved by any notice, condition, or declaration.

Held, also, that notice of the release to the C. P. R. having been given to the G. T. R. before the trial, the G. T. R. were not entitled to a new trial on the ground of surprise, or the discovery of new evidence.

Held, also, that the G. T. R. and C. P. R. were not joint contractors or joint tortfeasors, and that proof of the alleged release would not relieve the G. T. R. from liability. *McMillan v. Grand Trunk R.W. Co. et al.*, 103.

2. Overhead bridge—Accident—Liability—Contributory negligence.]

—Action to recover damages for injuries sustained by the plaintiff by reason of an overhead bridge being less than seven feet above the defendants' car. At the time of the accident the defendants were operating the Midland Railway under an agreement made September 22nd, 1883, whereby it was agreed that the defendants should take over all the lines of the Midland Railway Company, buildings, rolling stock, stores and materials of all kinds, and should during the continuance of the agreement well and efficiently work the said lines and keep and maintain them with all the works of the Mid-

land Railway in as good repair as when they were taken over. The agreement was to be in force for twenty-eight years. The Midland Railway Company, though incorporated under 44 Vict. ch 67, (O.), was brought under the control of the Parliament of Canada, and made a Dominion Railway, by 46 Vict. ch. 24 (D.), passed in 1883, before the agreement was made. By the Act of 1881, 44 Vict. ch. 24, sec. 3 (D.), amending the Consolidated Railway Act of 1879, every bridge or other erection or structure under which any railway passes, &c., existing at the time of the passing of the Act, of which the lower beams were not of sufficient height from the surface of the rails to admit of an open and clear headway of at least seven feet, shall be re-constructed or altered within twelve months from the passing of the Act so as to admit of such open and clear headway, of at least seven feet, at the cost of the company, municipality, or other owner thereof, as the case may be, &c.

By 44 Vic. ch. 22 (O.), passed when the Midland Railway was under the legislative authority of the Province of Ontario, that railway was required to re-construct bridges owned by the company within 12 months from the passing of the Act in terms identical with the Dominion Act except that the former Act makes every railway liable to its servants for any neglect, &c.

Held, GALT, J., dissenting, that the defendants were not liable for the injury sustained by the plaintiff.

The plaintiff was necessarily on the top of the car in the performance of his duty. There was no evidence to shew that he knew, at the time of the accident, that he was near the bridge, the night being dark; and it

was a matter of doubt whether he even knew that the bridge was too low. The bell rope was not connected before the train left the station, but this did not appear to have been through any neglect of his, and, for all that appeared, the train might not have been completed until just before starting, and until the engine was attached no connection could be made.

Held, that the plaintiff could not be deemed guilty of contributory negligence *McLauchlin v. Grand Trunk R. W. Co.*, 418.

3. *Conversion—Expropriation by railway company—Award—Compensation—Price of land taken, and depreciation to remainder—Who entitled to, on death of land owner—Trustee of real estate or executor.*]

P. being the owner of certain lands was served by a railway company with notice of expropriation and tendered a sum of money for right of way and damages, which he refused. Subsequently on the application of the company with the consent of P.'s solicitor the County Judge made an order fixing the amount of security to be given for damages and the price of the land, and giving the company possession upon their paying the amount of such security into a bank to the joint credit of P. and the company. The money was paid in pursuant thereto. An arbitration was then proceeded with, and the compensation to be paid for the value of the land taken and the damage to the remainder, was fixed by the award in separate sums. Proceedings and appeals as to the costs kept the matter open, and the money remained to the credit of the joint account until P. died, after making his will, by which he devised all his real estate, to a trustee, and appointed

the plaintiff executor. The defendants were appointed trustees in place of the trustee named in the will. Upon a special case for the opinion of the Court as to whether the plaintiff as executor of the personal estate or the defendants as trustees of the testator's land, was or were entitled to the sums awarded or any part thereof. It was

Held, that notice to treat having been given, and a claim made by the land owner, and refused by the company, and the money having been paid into Court and possession taken by the company, these circumstances under the authority of *Nash v. The Worcester Improvement Commissioners*, 1 Jur. N. S. 973, would entitle the land owner to have specific performance against the company, and that therefore the land was converted into money and the plaintiff as executor was entitled to the sums awarded. *Hoskin v. The Toronto General Trust Co.*, 480.

4. *Railway company—Farm crossing—Duty to provide and maintain gate fastening—Negligence—Liability—47 Vic, ch. 11, sec. 9, (D.).*]

Plaintiffs' horses, in consequence of insecure fastening of the gates at the farm crossing, where the defendants' railway crossed their farm, got through the gates and on the railway track, and were killed by a passing train.

Held, that the plaintiffs, by reason of the continued use of the faulty fastening, could not be deemed to have adopted them as sufficient, and that it was the duty of the defendants to provide and maintain proper fastenings for the gate.

Section 9 of the Statute 47 Vic. ch. 11 (D.), commented on as to the nature of the duty cast on the plaintiffs to keep the gates closed; and,

Quære, whether the woads in that Act, that the owners must keep the gates closed, extend further than in respect of their own use of them; or whether if the gate, became open by any accidental means, or by the act of a stranger, and remained open without any person being near to prevent animals passing through it, the owner or occupier would be liable to the full extent provided by the Act, although it had become open without his agency or neglect, and remained so without his knowledge. *McMichael v. Grand Trunk R. W. Co.*, 547.

5. *Railways — Expropriation of lands—Method of fixing compensation—The “taking”—Allowance of interest to landowner.*—In fixing compensation to a landowner for lands expropriated by a railway, the rule is, to ascertain the value of the land of which it forms a part before the taking, and the value of such land after the taking, and deduct one from the other, the difference thus arrived at being the actual value to the owner of the part taken,

Rule laid down by Cameron, C.J., in *Re arbitration between The Ontario and Quebec R. W. Co. and George Taylor*, 6 O. R. at p. 348, followed.

The “taking” is properly fixed as at the date of the company giving notice to the landowner of their intention of taking the land; and it is not correct to say that the value of the lands should be taken as of a date prior to knowledge of intention to construct, or in anticipation of the construction of the railway.

Interest is properly allowed to the landowner on the amount of his compensation from the time of the taking as above defined to the time of the award. *James v. Ontario and Quebec R. W. Co.*, 624

REGISTRY LAWS.

Instrument registered against one lot not notice as regards another lot—Lease for life—Statute of Limitations.—See LANDLORD AND TENANT, 1.

Registration of prior conveyances no bar to action for damages for breach of covenants of title.—See COVENANT, 2.

RES JUDICATA.

Verdict of jury.—See INSURANCE, 2.

REVISING OFFICER.

Parliamentary elections—Mandamus — Jurisdiction of Provincial Courts to grant mandamus.—See PARLIAMENTARY ELECTIONS, 1.

ROADS AND ROADWAYS.

Contract for cedar block roadway—Progress certificates.—See CONTRACT, 2.

SALE OF GOODS.

1. *Hire receipt—Property passing—Engine and boiler—Illegal detention.*—An engine, boiler, and other machinery, were shipped by plaintiffs to the defendant E. under a written order to ship same to his address as per sum agreed on, viz., \$875; \$225 to be allowed for E.'s portable engine and boiler, and \$635 to be paid on shipment; but, if not settled for in cash or notes within twenty days, then the whole amount to become due. The order not to be

countermanded, and until payment the machinery to be at E.'s risk, which he was to insure, and on demand was to assign the policy to the plaintiffs, and the title thereof was not to pass out of plaintiffs, E. agreeing not to sell or remove same without the plaintiffs' consent in writing. On default in payment the plaintiffs could enter and take and remove the machinery, and E. agreed to deliver same to plaintiffs in like good order and condition as received, save ordinary wear and tear, and to pay expenses of removal. Any notes or other security given by E. for his indebtedness to be collateral thereto. The machinery was put up in a mill on premises leased, with right of purchase, by defendant D. to E.'s wife for one or five years from 11th March, 1883. E.'s wife died on the 23rd October, 1883, and by her will appointed E. sole executor, giving him power to sell or dispose of any property to which testatrix was or might be entitled. E. by deed of 27th April, 1885, demised and released to D. all the right, title, and interest in the premises as well of himself as also as executor, together with the mill built thereon, with the boiler and engine, &c., and on the same day D. leased the said premises, mill and machinery, to E. for one year. After the execution of this lease D. mortgaged the land, mill and machinery to the defendants the F. Loan Society. The defendant E. never paid any cash, but gave his promissory note at 3 months, which was renewed from time to time, but ultimately E. having failed to pay same, the plaintiffs demanded the machinery when D. notified plaintiffs not to remove same, as also did the Society.

Held, that the effect of the transaction was, that the property was in

the plaintiffs, and that they were entitled thereto: and that there was an illegal detention by the defendants D. and E. amounting to a conversion; and that the F. Co. by having notified plaintiff not to remove the machinery, were proper parties to the suit to give plaintiffs full relief; and that unless defendants allowed plaintiffs to remove the machinery on demand, the plaintiffs were entitled to recover \$650 with interest, being the price of machinery, and that upon removal of the engine and boiler the sum of \$60 for repairs should be paid by plaintiffs to D. to be repaid to plaintiffs by E. *Polson v. DeGeer*, 275.

2. *Agreement for — Warranty — Action for breach of — Property passing — Written notice — Waiver.*] — By a written agreement the defendants sold a threshing machine for \$500 to the plaintiff, taking an engine in part payment of \$250, the balance to be secured by promissory notes. The right of possession was to be in plaintiff until default, but until payment the right of property was to be in defendants, with a warranty by defendants that with good management the machine would do good work and was superior to any other machine made in Canada, &c.; and if upon starting the machine, the plaintiff, following the printed hints, rules, and directions of the defendants, was unable to operate it well, he was to give defendants written notice of the defect, and a reasonable time was to be allowed defendants to get to the machine and remedy the defect, unless they could advise by letter; but if they were unable to make it operate well, &c., and the fault was in the machine, they were to take it back and refund the payments made, or remedy the

defective part, but if the fault was through improper management or neglect to observe the printed, &c., directions, the plaintiff was to pay all necessary expenses incurred; and if, plaintiff observing such directions, any part, except belting, failed during the year, through any defect in material, the defendants, on presentation at the manufactory of the defective piece, were to furnish a duplicate thereof, but defects in pieces were not to condemn other parts. Deficiencies in general adaptation for threshing, separating, &c., for which alone the machine should be taken back, must be reported ten days after starting the machine, and not after continued use or injury thereto. The defendants had, on the plaintiff's complaint, attended and made alterations in the machine, whereupon the plaintiff used the machine for six weeks, and then sent it back to the defendants, because, as the plaintiff said, it failed to comply with the warranty, and he had no further use for it; but, as defendants understood, to be repaired. The plaintiff did not ask for the return of the engine. No printed hints, &c., were given by defendants, nor written notice of the defect given by plaintiff; and no default was made by plaintiff in payment of the instalments. In an action to recover the \$250, the value of the engine taken as part payment, the redelivery of the notes, and \$500 damages for breach of warranty.

Held, following *Frye v. Milligan*, 10 O. R. 509, that as the property in the machine had not passed to the plaintiff, he could not maintain an action for breach of warranty.

Held, also, that the plaintiff was not entitled to return the machine after the expiration of ten days, no

notice in writing of the defect complained of having been given; and that the fact of the defendants' previous attendance to make alterations, did not constitute a waiver of their right to such notice, as the evidence shewed that when plaintiff sent for defendants he did not intend giving notice with a view of availing himself of the right to rescind; and the starting under the contract must be regarded as that which took place after the machine was so altered. *Tomlinson v. Morris*, 311.

SALE OF LANDS.

1. *Vendor and Purchaser*—*R. S. O. ch. 109, sec. 3*—*Solicitor's abstract*—*Paper title*—*Title by possession*—*Declaration evidence*—*Affidavit evidence*—*Viva voce evidence*—*Title by decree*—*Specific performance*.]—B. agreed to sell certain land to W., and in the agreement it was provided that "the examination of title to be at the expense of the purchaser who is to call for only those deeds and papers in my possession or under my control." W. demanded a solicitor's abstract which B. declined to furnish; and on the examination of the title it was discovered that a deed was missing which had not been registered, so that a clear paper title could not be made out. B. then offered evidence of a title by possession by declarations under 37 Vic. ch. 37 (D.), which W. declined to accept.

Held, on an application under the Vendor and Purchaser Act, R. S. O. ch. 109, sec. 3, that B. was bound to furnish an abstract, and that W. was not bound to accept declaration evidence of the title by possession, and the vendor was directed to obtain affidavits from the declarants, when the purchaser could cross-examine

the deponents, and if not satisfied with that, although he might be thought unreasonable, the purchaser was entitled to have the evidence taken *viva voce*, and have his title sanctioned by a decree, in which case, and for that purpose leave was given to him to institute a suit for specific performance, all costs of which were reserved until the hearing. *Re Boustead and Warwick*, 488.

2. *Rent charge—Rent service—Rent seck—Charge on land—Apportionment—Notice.*]—On the 1st of December, 1870, A. M. by deed, conveyed certain lands to his grandson, W. M. and D. M., as tenants in common; and on the same day an agreement in writing was made between the parties whereby W. M. and D. M. agreed to pay the following sums of money, and fulfil the agreement, namely, that W. M. and D. M. should thenceforward support their mother, the plaintiff, and furnish her with reasonable, suitable, and comfortable board, lodging, and clothing, and medical attendance during her lifetime, and maintain her in a proper manner; and that in the event of any disagreement between W. M., D. M. and the plaintiff, whereby she would be obliged to leave the said premises, they were to pay her \$55 a year in lieu of such board, &c., and, if not paid, to be recoverable by suit at law. The covenants, payments and annuities to be chargeable against the said land. The plaintiff was no party to the agreement. On the 4th of October, 1872, W. M., for a nominal consideration of \$1000, conveyed his half interest to the plaintiff; but of which she said she was not aware; and on March 1st, 1877, she reconveyed the same to W. M. "free from incumbrances." On 12th of Jan-

uary, 1882, D. M. sold his undivided half interest to C., and a conveyance was executed, but the sale was never carried through. On 27th September, 1883, D. M. sold his said interest to G. A. B., and, to save registration charges, the conveyance was made by C. to G. A. B. On 20th March, 1884, G. A. B. conveyed to E. and S., who in May, 1884, ejected the plaintiff from the land. The agreement was not registered until 27th January, 1882.

Held, reversing the judgment of GALT, J., at the trial, that the agreement did not create a rent charge, as no power of distress was conferred: that if either a rent service or a rent seck there would be a right of distress and apportionment; but if neither, but a covenant charged on land, performance of it would be decreed; that upon the conveyance by W. M. to the plaintiff, the whole charge was not extinguished, but an apportionment took place; and that therefore defendant was entitled to enforce performance against D. M.'s undivided half interest, in the hands of E. and S., whom the evidence shewed were purchasers with notice. *McCaskill v. McCaskill*, 783.

SEDUCTION.

1. *Seduction—Evidence—Admission of defendant—Excessive damages.*]—In an action of seduction the only evidence was that of the plaintiff, the father of the seduced girl, and the defendant, the girl having died shortly after the birth of the child. The plaintiff stated that the defendant had admitted that he had seduced the girl, and asked what the case could be settled for. The defendant denied that he was the father

of the child, or that he had made any such admission: that he had heard L. spoken of as the father of the child. He admitted having asked what the case could be settled for, but that he said so because he heard plaintiff was asking \$1,000, and he wished to know what it could be settled for: that he did not do so with a view to any one but merely out of curiosity. The jury found for the plaintiff with \$750.

Held, that there was sufficient evidence to go to the jury in support of the plaintiff's case; and that the damages, under the circumstances, were not excessive. *Palmby v. McCleary*, 192.

SOLICITOR AND CLIENT.

1. *Mortgage-Custody of-Authority to receive mortgage money-Solicitor not agent to receive money.*]—M. desiring to raise money upon mortgage of his lands, part whereof was to go to pay off certain existing incumbrances thereon, arranged with a certain solicitor that the latter should get him the money, and he and his wife executed a mortgage for the amount, and left it in the hands of the solicitor. The latter received the mortgage money from the mortgagee and absconded. M. now sued the mortgagee, claiming the money or a discharge of the mortgage.

Held, that leaving the mortgage with the solicitor did not prove that the latter was M.'s agent to receive the money, and the defendant had not satisfied the onus resting upon him of proving this fact, and therefore M. was entitled to judgment as claimed. *McMullen v. Polley*, 702. See, also, S. C. 13 O. R. 299.

SPECIFIC PERFORMANCE.

Vague and uncertain contract—Contract providing for security to be given but not specifying the kind.]—See CONTRACT, 1.

STATUTE OF LIMITATIONS.

Lease for life—Registry laws.]—See LANDLORD AND TENANT, 1.

Action on covenant in a mortgage.]—See MORTGAGE, 2.

Husband and wife — Breach of promise of marriage — Statute of Limitations.]—See HUSBAND AND WIFE, 1.

STATUTES.

B. N. A. Act, s. 92, sub-sec. 13.]—See CONSTITUTIONAL LAW, 1.

Consolidated Municipal Act, 1883—Arbitration clauses.]—See ARBITRATION AND AWARD, 1.

Consolidated Municipal Act of 1883, s. 486.]—See MUNICIPAL CORPORATIONS, 1.

Consolidated Municipal Act, 1883, s. 495, sub-s. 3.]—See HAWKERS AND PEDLARS, 1, 2.

Devolution of Estates Act.]—See DESCENT.

Consolidated Railway Act, 1879, s. 25, sub-s. 4.]—See RAILWAYS, 1.

O. J. A. Act, 1881, s. 17, sub-sec. 5.]—See COVENANT, 2.

Trade-mark and Design Act, 1879 (D.)]—See TRADE-MARK, 1.

9 *Anne*, c. 14.]—See GAMING, 1.

31 *Vict.* c. 48 (*D.*)—See CORPORATIONS 1.

32-33 *Vict. c. 22, ss. 29, 60, (D.)*—See *WAYS, 2.*

32-33 *Vict. c. 31, s. 52 (D.)*—See *CANADA TEMPERANCE ACT, 1.*

32-33 *Vict. c. 31, ss. 57, 62 (D.)*—See *CANADA TEMPERANCE ACT, 2.*

34 *Vict. c. 9 (D.)*—See *CORPORATIONS, 1.*

38 *Vict. c. 88 (D.) secs. 9, 17.*—See *COPYRIGHT, 1.*

R. S. O., c. 47, s. 53, sub-s. 3.—See *GAMING, 1.*

R. S. O. c. 47, s. 92.—See *PROHIBITION, 1.*

R. S. O. c. 71, ss. 7, 22.—See *CANADA TEMPERANCE ACT, 1878, 5.*

R. S. O. c. 107, s. 9.—See *COVENANT, 1.*

R. S. O. c. 108, s. 23.—See *MORTGAGE, 2.*

R. S. O. c. 109, s. 3.—See *SALE OF LANDS, 1.*

R. S. O. c. 180, s. 106.—See *ASSESSMENT AND TAXES, 2.*

41 *Vict. c. 16 (D.)*—See *CANADA TEMPERANCE ACT, 1878.*

42 *Vict. c. 31, s. 35.*—See *ASSESSMENT AND TAXES, 1.*

44 *Vict. c. 67 (O.)*—See *RAILWAYS, 2.*

44 *Vict. s. 22 (O.)*—See *RAILWAYS, 2.*

44 *Vict. c. 24, s. 3 (D.)*—See *RAILWAYS, 2.*

45 *Vic. c. 19, s. 3 (O.)*—See *MUNICIPAL CORPORATIONS, 3.*

46 *Vict. c. 18, ss. 524, 526, 531, 544, 546, 550, 566 (O.)*—See *MUNICIPAL CORPORATIONS, 2.*

46 *Vict. c. 24 (D.)*—See *RAILWAYS, 2.*

47 *Vic. c. 11, s. 3 (D.)*—See *RAILWAYS AND RAILWAY COMPANIES, 4.*

47 *Vict. c. 32, s. 13 (O.)*—See *CONVICTION, 1.*

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48 *Vic. c. 26, sub-s. 4 (b) (O.)*—See *ASSIGNMENT FOR CREDITORS, 1.*

48 *Vict. c. 26, ss. 2 & 3 (O.)*—See *FRAUDULENT CONVEYANCE, 1.*

48 *Vict. c. 40, s. 1 (O.)*—See *HAWKERS AND PEDLARS, 1, 2.*

48-49 *Vict. c. 40, s. 2, sub-s. 2, s. 19, and s. 26 (D.)*—See *PARLIAMENTARY ELECTIONS, 1.*

49 *Vict. c. 22 (O.)*—See *DESCENT, 1.*

49 *Vict. c. 49, ss. 2, 3, 5, 7, 8 (D.)*—See *CERTIORARI, 1, 2.*

49 *Vic. c. 25 (O.)*—See *FRAUDULENT CONVEYANCE, 2.*

SUBROGATION.

Insurance — Partial — Various policies.—See *INSURANCE, 2.*

TAX SALE.

Taxes in arrear for three years—Evidence of arrears prior to patent—onus of proof.—See *ASSESSMENT AND TAXES, 2.*

Improper assessment — Non-resident lands—Admissibility of evidence to correct non-resident roll.—See *ASSESSMENT AND TAXES, 3.*

TELEPHONE COMPANY.

Interference with polls of Electric Light Company.—See *MUNICIPAL CORPORATIONS, 3.*

TIMBER.

Agreement for sale of—Time limited for removing logs—Grant subject to condition.—See *DEED, 3.*

TITLE.

Title by possession—Declaration evidence—Viva voce evidence—Delivery of abstract—Specific performance—See SALE OF LANDS, 1.

TRADE MARK.

1. *Trade Mark and Design Act of 1879—Action to restrain infringement of registered trade mark—Prior user—Definition of trade mark.*]—In an action to restrain the infringement of a trade mark registered under the "Trade Mark and Design Act of 1879."

Held, following *McCall v. Theal*, 28 Gr. 48, that prior user can be given in evidence to invalidate the trade mark.

Held, also, that the words "Gold Leaf" used in the plaintiff's trade-mark distinguished the flour made by the plaintiff from that made by any other person, and, as such, was a proper subject of a trade mark within the language of section 8 of the Act.

Held, also, on the evidence that "Gold Leaf" was a common brand for patent flour in use before the registration of the plaintiff's trade-mark, and that "the plaintiff had not the right to endeavour to attribute to that which he might manufacture a name which had been for years before a well-known and current name by which that article was defined," and that there must be judgment for defendant with costs. *Partlo v. Todd*, 171.

2. *Infringement—"Imperial"—Word in common use not eligible as trade mark.*]—The plaintiffs having registered as a trade mark the words "Imperial cough drops," now sued

the defendant for infringement thereof by selling confectionery under the name "Imperial cough candy."

Held, that inasmuch as the evidence shewed that the word "Imperial" as a designation or mark for cough drops or candy was really public property, and a common brand or designation for candy long before the plaintiffs' registration, the plaintiffs had not the right to attribute to that which he might manufacture a name which had been for years before a well-known and current name by which that article was defined and the action must be dismissed.

Partlo v. Todd, 12 O. R. 171, followed. *Watson v. Westlake*, 449.

TRIAL.

Charging jury as to necessity of corroborative evidence—Accomplice—Criminal law.]—EVIDENCE, 1.

TRUSTEES AND EXECUTORS.

Conversion — Expropriation by railway company — Compensation money— Who entitled to on death of owner.

See RAILWAYS AND RAILWAY COMPANIES, 3.

WARRANT OF COMMITMENT.

Need not be dated if not issued too soon.]—*See* CANADA TEMPERANCE ACT, 1.

WASTE.

Action of waste.]—*See* COVENANT, 1.

WAYS.

1. *By-law to establish roads—Boundaries—Omitting to state—Invalidity—Statute labour—Performance, evidence of.*—A by-law to establish a road must on its face show the boundaries of the road or refer to some document wherein they are defined; and the intention of the framers of the by-law cannot be ascertained by extrinsic evidence.

Held, therefore, that a by-law, to establish a road on a blind line between two concessions in the plaintiff's township was by reason of such omission invalid.

Held, also, that there was not sufficient evidence given of statute labour having been performed on the road, so as by reason thereof to make it a highway.

Corporation of Town of St. Vincent v. Greenfield, 297.

2. *Conviction — Highway — Unlawfully and maliciously removing gate from—32-33 Vict. ch. 22, ss. 29, 60 (D.)—"Fair and reasonable" supposition of right—Jurisdiction of Justice.*—S. owned lot 38 in 8th concession of N. In 1886 he sold the west-half of the lot to complainant, reserving a strip of thirty feet along the north line thereof as a road for himself and successors in title to and from the east half of the lot. S. put up a gate at the west limit of the land where it met the highway, which gate had been there from 1866 until removed by the defendants. Defendants were successors in title to S. and removed the gate in question as an obstruction, and were convicted for unlawfully and maliciously breaking and destroying the gate at the west end of the said road, as the property of the complainant: *Held*, that defendants were acting in

good faith in claiming the right to remove the gate, and under fair and reasonable supposition of right, and the conviction was quashed.

Held, also, that the question of a fair and reasonable supposition of right to do the act complained of was a fact to be determined by the justice, and his decision upon a matter of fact would not be reviewed, but that this rule did not apply where, as here all the facts shewed that the matter or charge itself was one in which such reasonable supposition existed; that is, where the case and the evidence were all one way and in favor of the defendant.

Regina v. Malcolm, 2 O. R. 511, distinguished.

Quare, whether a gate across a right of way is an obstruction in law.

Held, also, that proviso in 32-33 Vic. ch. 22, sec. 60, is to be read as applicable to sec. 29 and to the whole Act. *Regina v. McDonald*, 381.

Municipal corporations—Original allowance for road—Duty to open—Mandamus.—See MUNICIPAL CORPORATIONS, 2.

WILL.

1. *Devise—Legacy—Maintenance to widow and family—Abatement of legacies.*—A testator gave to his executors and trustees, of whom his wife was one, all his real and personal estate, with a direction to convert his personal estate into money, pay debts, and invest the balance. He directed them to pay his wife from time to time such money as might be sufficient to support, maintain, and educate his family, and to maintain his wife in a manner suited to their condition in life,

and for that purpose gave his wife power to collect money and to take therefrom enough to maintain his family and herself. And he directed his sons to pay her \$150 a year after they received their lands, charging it on his lands, but they were not to pay it so long as she and the family were maintained out of the estate. The trustees were to pay \$1,000 to each of the daughters as they attained twenty-one, and if there was not sufficient personal estate to pay them, the balance was to be a charge on the real estate: the real estate was to be divided between the sons when the eldest attained twenty-five, and then the trustees were to give him \$2,000. The balance of the personal estate was to be divided between the sons, the eldest being charged with his \$2,000. The testators' widow married again.

Held, that the children were only entitled to maintenance until they attained their majorities.

Held, that the widow was entitled to maintenance until the provision as to the \$150 came into operation which would be when the sons respectively attained twenty-five. Although the maintenance was to be made from the personal estate, and no part of the rents were assigned for that purpose, as the devisees of the real estate were not entitled until they attained twenty-five, the intermediate rents not being disposed of descended to the heirs-at-law, *i.e.*, the children, and might be applied for their maintenance if the personal estate was sufficient.

When a testator has himself specified the time for the duration of maintenance, that will be observed; but the right to maintenance and support, when given in general terms, will cease with the marriage or forisfiliation of a child. *Knapp*

v. Noyes, Amb. 662; *Gardner v. Barber*, 18 Jur. 508; and *Wilkins v. Jodrell*, 13 Ch. D. 564, considered and commented on.

A widow ceases to be entitled to support and maintenance upon marrying again.

Quere as to her rights if she should again become a widow without means of support.

The personal estate turned out insufficient to pay the legacies of which the one of \$2,000 was first payable out of those remaining unpaid.

Held, if the \$2,000 legacy to the son absorbed all the personal estate the daughters would get none of it as their legacies were charged on the land, and that the \$2,000 legacy and the legacy for maintenance must abate proportionally, and that there was no ground for marshalling. *Cook v. Noble*, 81.

2. *Construction — Intestacy — Blended fund—Distribution per capita.*—A testator by his will directed his executors to pay his debts, funeral expenses and legacies thereafter given out of his estate, and proceeded: "My executors are hereby ordered to sell all my real estate, after the payment of all my just debts and funeral expenses, and all my property and personal effects, money, or chattels are to be equally divided between my children and their heirs, that is, the heirs of my son G. and daughter E., now deceased; and my son J., Mary and Hannah, or their heirs. Should any of my said heirs not be of age at my death, my executors are to place their legacies in some of the banks of Ontario until the said heirs are of age."

Held, (1) That there was no intestacy either of the real or personal

estate. It is to be presumed that the testator did not intend to die intestate, and the language shewed he did not intend his heirs to take his property as real estate, as he peremptorily directed a sale, making an actual conversion of it into money, thus blending the real and personal property into a common fund, and then bequeathed it all to the legatees.

(2) That the persons entitled to share under the will took *per capita* and not *per stirpes* upon the same principle as in the case of *Abrey v. Newman*, 16 Beav. 431.

(3) That the grandchild of G. was not entitled to a share, the children of G. taking in their own right and not in a representative capacity. *Wood v. Armour*, 146.

3. *Devise — Limitation to "offspring" — Life estate of ancestor — Misrepresentation — Execution of deed without consideration.*]—J. P., by his will, provided as follows: "I give and devise to my brother D. P. the * * * on which he resides * * * to hold the same to the said D. P. for and during his natural life, and after the death of the said D. P. I give and devise the said * * * to H. P., second son of said D. P., to be held by the said H. P. for and during his natural life, and if the said H. P. shall leave offspring him surviving, then I give and devise the same to such of his offspring as the said H. P. shall appoint, and in case of no appointment being made by the said H. P. in his lifetime, then I devise the same equally to the children of the said H. P. in fee, and in case the said H. P. shall die without lawful offspring or during his father's lifetime, then I give and devise the same to * * * D. P. and H. P. by conveyances and mortgages dealt

with the land as if they were the owners in fee. After several mortgages to one J. E., who was J. P.'s solicitor, were registered against the land, and after D. P.'s death, J. E. having assured H. P. that his (J. E.'s) title to the land was perfectly good, and that H. P.'s children had no interest in it, persuaded H. P. as a matter of form to execute the power of appointment in favour of L. S. one of his children, and to obtain from L. S. and her husband, without their knowing of the execution of the power of appointment, and on making the same representation and without consideration, a quit-claim deed of all their interest in the land. In an action by L. S. and her husband, on discovering their interest, to have the quit claim deed delivered up to be cancelled, and to have it declared that the conveyances and mortgages made by D. P. and H. P. only bound their life estates. It was

Held, that only a life estate was given to H. P. and not an estate in fee tail. If "offspring" is read as "children," or construed as meaning "issue," the devise fails within the rule that when words of distribution, together with words which would carry an estate in fee are attached to the gifts to the issue, their ancestor takes for life only. Here to the children or issue, in default of appointment, is given expressly an estate "*in fee*," and it is distributed "equally."

Held, also, that untrue representations were made which induced the execution of the power of appointment and the transfer of the estate thereunder without consideration; and that the instruments subsequent to the deed of appointment, did not affect the fee simple of the land, and that the operation

of the mortgages should be limited to the life estate of H. P. in the land. *Sweet et al v. Platt et al.*, 229.

4. *Construction—Absolute bequest cut down to estate for life—Precatory trust.*]—A testator made his will as follows: "I bequeath to my wife E. K. all the real and personal property that I die possessed of * * * My wish and desire is. that she shall divide the said real or personal property, £50 to my daughter S., £50 to my daughter E., the balance to my son W., (providing any more) (if a daughter) £50, and if a son then the balance after £50 to each of my daughters to be equally divided betwixt them at her decease."

Held, reversing the decision of Proudfoot, J., that the widow, E. K. took a life estate in the whole real and personal property, excepting what was necessary to pay the legacies. *Wilson v. Graham et al.*, 469.

5. *Will — devise — Life estate — Appointment.*]—A. by his will devised as follows: "I give and bequeath to my nephew B., and C. his wife, (describing the land), to their use for the term of their natural life, and at their decease to be divided among their children as they may see fit." C., the wife, died, and after her death B. conveyed to one of his children, D. B. and D. then mortgaged to the company, and the company sold to E. under the power of sale in the mortgage, but E. refused to take the company's title.

Held, that B. and C. took an estate for life only: that the appointment of one child to the exclusion of the rest was not a valid appointment, and that the title offered was not one that the purchaser could be compelled to accept.

Semble. Had a similar appointment been made by both husband and wife it would have been invalid. *Re Ontario Loan and Savings Co. and Powers*, 582,

6. *Specific bequest of a mortgage indebtedness—Right of executors to refuse to discharge until other indebtedness paid—Assent of executor to specific legacy—Administration proceedings.*]—A testator by his will directed his executors to cancel and entirely release the indebtedness of his son W. S. upon and by virtue of a mortgage to the testator, such release to operate and take effect immediately on and from the testator's death. In an action for the administration of the testator's estate, W. S. claimed the discharge of the mortgage, but the executors contended that they were not bound to give it until W. S. paid the amount of his other indebtedness to the estate. The Master found in favour of the executors. On appeal from the Master it was

Held, that the executors were not entitled to insist on payment of the other indebtedness before discharging the mortgage.

Held, also, following *Northey v. Northey*, 2 Atk. 77, that although at law the assent of the executor is necessary to the vesting of a specific legacy, in equity he is considered as a bare trustee, and if he refuse his assent without cause he may be compelled to give it, and that here the executors' refusal was without cause.

Held, also, that a decree in an administration suit, although it may enure to the benefit of all creditors of an estate, does not prevent the Statute of Limitations from running against debtors to the estate.

Held, also, that a clause in the answer of W. S. expressing his

willingness that the will should be construed by the Court and the rights of the parties thereunder determined had not the effect of waiving any right that might have accrued to him during the progress of the suit. *Archer v. Severn*, 615.

7. *Devise to children—Period of distribution—Survivorship—Who entitled.*—S. P. by her will provided as follows: "Also, I will and ordain that my said (property) after the death of my before mentioned daughters E. O. W. and S. A. W., be sold * * and the proceeds * * be divided between the children of my daughters E. O. W., M. K., and S. A. W., * * one-third to the children of the said E. O. W., one-third to the children of the said M. K., and one-third to the children of the said S. A. W., share and share alike, and in case of the decease of one of the said families of children as aforesaid, then I will and ordain that the said proceeds * * be equally divided between the two remaining families, the children of each family receiving, share and share alike, of such half to each family." At the time of the making of the will M. K. was dead, leaving three children who survived the testatrix. S. A. W. survived E. O. W., and died many years after the testatrix. All three of the said children of M. K. pre-deceased S. A. W., two of them intestate and without issue, and one leaving two children who survived S. A. W. E. O. W. had three children, one of whom died childless before the testatrix, and the other two survived S. A. W. S. A. W. had several children, one of whom died during her lifetime leaving children, and the others all survived her.

Held, that the period of distribution was the time of the death of M. A. W., and that the children of E. A. W. and M. A. W., *then living*, were entitled to the whole of the property, one moiety to each family, the members of each family sharing equally their moiety. *Jenkins v. Drummond et al.* 696.

WORDS.

"*A building*"—*Fire insurance—Tug boat.*]—See INSURANCE, 1.

"*Agents*"—See HAWKERS AND PEDLARS, 2.

"*Disposal*"—See CANADA TEMPERANCE ACT, 5.

"*Dry goods.*"—See HAWKERS AND PEDLARS, 1.

"*Imperial*"—See TRADE MARK, 2.

"*Owner*"—See CERTIORARI, 2.

"*Payable at Par.*"—See BANKS AND BANKING.

"*Reasonable wear and tear.*"—See COVENANT, 1.

"*Sale*"—See CANADA TEMPERANCE ACT, 5.

"*Sell, lease, or otherwise dispose of*"—See CONSTITUTIONAL LAW, 1.

"*Shall no longer apply*"—See CERTIORARI, 2.

"*Stored or kept*"—*Fire insurance—Earth oil.*]—See INSURANCE, 1.

"*Taking*" of land by railway company.]—See RAILWAYS AND RAILWAY COMPANIES, 5.

